SUPREME COURT, U. S.

FILED

SEP 16 1970

ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 444

MRS. ROBERT LEE MOORE, ET AL,

Appellants

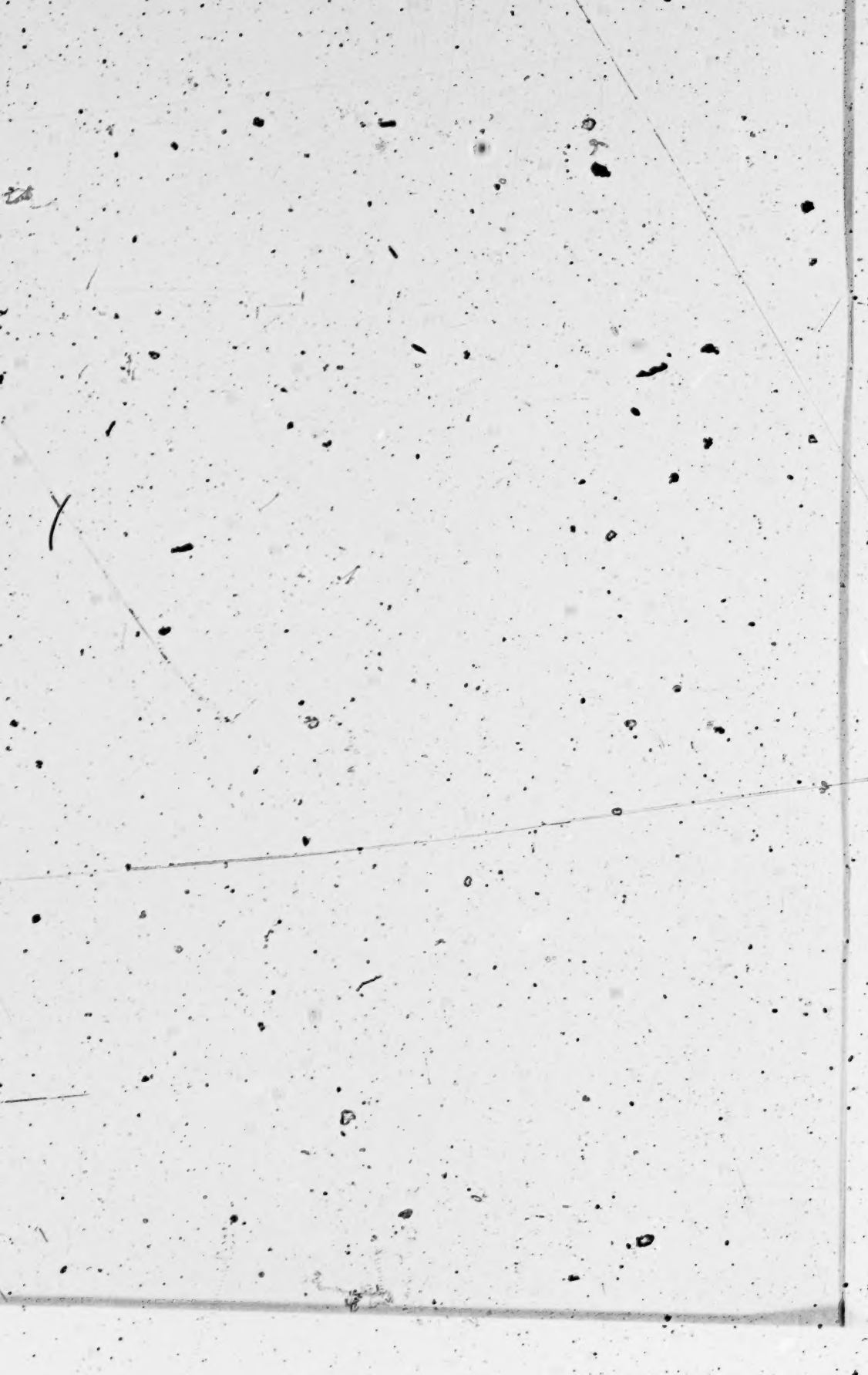
vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL,

Appellees

On Appeal From A Decision Of A Three-Judge Court In The United States District Court For The Western District Of North Carolina

APPENDIX



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DOCKET ENTRIES

Civil No. 2631

Date		*Proceedings*
2-27-70	No. 1	Filed petition for removal; bond on removal; copies of summons and complaint and restraining order.
2-27-70	No. 2	Filed notice of petition for removal and petition for removal of action from State court.
3- 2-70	No. 3	Filed application by plaintiffs for injunctive order—and defendants' application for order—three-judge court requested.
3-23-70	No. 3a	Filed answer of School Board to plaintiffs' complaint, with certificate of service.
3-24-70	No. 4	Filed plaintiffs' request for admissions, with attachments.
3-24-70	No. 5	Filed defendants' answer to request for admissions.
3-25-70	No. 6	Filed notification and request for designation of three-judge court.
3-25-70	No. 7	Filed designation of three-judge court: Judges Craven, Butzner and McMillan. Order signed by Chief Judge Haynesworth.

Date	*Proceedings*
3-25-70	No. 8. Filed motion of defendants with respect to membership of three-judge court.
3-25-70	No. 9. Filed order denying motion with respect to membership of three-judge court. Order signed by Chief Judge Haynesworth.
4-29-70	No. 10. Filed opinion of three-judge court—copies to counsel.
6-22-70	No. 11. Entered and filed final judgment (JBC-JDB-JBM): N. C. General Stat. 115-176.1 prohibiting assignment by race and bussing held unconstitutional; plaintiffs' motion to hold defendants in contempt denied; and various motions to dismiss are denied. Copies to counsel.
6-24-70	No. 12. Filed notice of appeal by plaintiffs to the Supreme Court, with certificate of service, and $250 bond for costs on appeal. Copies to William J. Waggoner and Benjamin S. Horack, counsel for defendants (and for School Board also).
7-22-70	Certifying record on appeal to Clerk, U. S. Supreme Court, Washington, D. C., in one volume. Copies of index and letter to counsel.

PLAINTIFFS COMPLAINT

NORTH CAROLINA
MECKLENBURG COUNTY

In The General
Court Of Justice
Superior Court Division

MRS. ROBERT LEE MOORE, for herself and for her minor children, OSCAR MOORE, LOIS MOORE, GRACE MOORE and JERRY MOORE, J. D. LITTLE, JR. and BETTIE C. LITTLE, for themselves and for their minor child, ALEC LITTLE, JOHN T. VERNON and NANCY H. VERNON, for themselves and for their minor children, PATTY VERNON, DAVID VERNON and ERIC VERNON, FLOYD T. BOYCE and LOUISE D. BOYCE, for themselves and for their minor children, LOU ANN BOYCE, LISA C. BOYCE and FLOYD T. BOST, JR., V. DON PERRIN and NANCY G. PERRIN, for themselves and for their minor children, VIC PERRIN, DONNA PERRIN and SANDRA PERRIN, JACK V. SCOTT and JANE B. SCOTT, for themselves and for their minor children, KENNY SCOTT and CRAIG SCOTT, MRS. MARTHA M. GLENN, for herself and for her minor child, CONNIE GLENN, WILLIAM M. HOOD, JR. and MARY D. HOOD, for themselves and for their minor children, ROBY WRENN HOOD, WILLIAM M. HOOD, III and MARY LIB HOOD, JOHN D. HASTY, for himself and for his minor children, JOHN D. HASTY, JR. and RENEE HASTY, AUBREY E. EASTERLIN, JR., for himself and for his minor step-children, BILLIE SEWELL, VICKIE SEWELL and KIM SEWELL, JAMES E. KING, for himself and for his minor children, LEIGH KING, CYNTHIA KING, SUSAN KING and JAN KING, MELVIN D. CHILDERS, JR., for himself and for his

minor child, CYNTHIA CHILDERS, THOMAS S. WEAVER and MARGARET S. WEAVER, for themselves and for their minor children, LIBBY WEAVER and TERRY WEAVER, TED E. MANNING and JACKIE MANNING, for themselves and for their minor child, STEVEN MANNING, HORACE DAVIS, JR. and EVELYN A. DAVIS, for themselves and for their minor children, HORACE DAVIS, III, EVELYN DAVIS and SUSAN DAVIS, ORRIE B. OATS, for herself and for her minor child, LEROY OATS, JR., THOMAS B. HARRIS, for himself and for his minor children, STEVE HARRIS and KELLY HARRIS, LORENE H. DRESSER, for herself and for her minor child, MICHELL DRESSER, JOHN H. HORNER, for himself and for his minor children, LAURA HORNER, JOHN HORNER and BRIAN HORNER, SHIRLEY C. NAIL, for herself and for her minor children, KIM NAIL and DEANA NAIL, G. DONALD ROBERSON, for himself and for his minor child, CHARLES ROBERSON, RAYMOND KENNETH YOUNG and EDNA R. YOUNG, for themselves and for their minor child, KATHY YOUNG, WILLIAM K. SUMMERVILLE, for himself and for his minor children, MICHAEL SUMMERVILLE and CRAIG SUMMERVILLE, JAMES L. KISER, for himself and for his minor child, KIMBERLY KISER, CHARLES N. BRILEY, for himself and for his minor children, ALLISON BRILEY and NATHANIEL BRILEY, WILLIAM R. DOWTIN and MARION W. DOWTIN, J. FRANK NEWTON and FRANCES M. NEWTON, W. BAINE MARTIN and ELIZABETH B. MARTIN, EDWARD S. FISHER and EMILY S. FISHER, THOMAS E. MCCABE and ANN R. MCCABE, LLOYD

ELLIS ZEDAKER, JR. and MARY FRANCES ZEDAKER, BRENDA A. HILL, BAXTER L. DIXON and HORACE N. WILLIAMSON,

Appellants

VS.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools,

Appellees

COMPLAINT

The plaintiffs, complaining of the defendants, say and allege:

(1) That the plaintiffs are citizens and residents of Mecklenburg County, North Carolina, most of them being also citizens and residents of the City of Charlotte.

(2) That the plaintiffs, other than the minor children above-named, are taxpayers of Mecklenburg County and the State of North Carolina, most of them being also taxpayers of the City of Charlotte.

(3) That there are included among the plaintiffs both white and Negro citizens, residents, parents, children and taxpayers.

(4) That the denials and compulsions and contemplated actions which are hereinafter described apply and directly and specifically affect the plaintiffs who are named above as parents and their children who are named above, and likewise to thousands of other parents and children in the City of Charlotte

and Mecklenburg County; that such other parents and children are so numerous that it is impracticable to bring them all before the Court; that such other parents and children constitute a class whose interests may properly and appropriately be represented by the parents and children who are plaintiffs herein; and that therefore the parents and children who are plaintiffs herein bring this suit both for themselves and in behalf of all other such parents and children

(5) That the denials and compulsions and contemplated actions which are hereinafter described affect all of the adult plaintiffs as taxpayers, and likewise all other taxpayers in the City of Charlotte and Mecklenburg County; that such other taxpayers are so numerous that it is impracticable to bring them all before the Court; that such other taxpayers constitute a class whose interests may properly and appropriately be represented by the taxpayers who are plaintiffs herein; and that the taxpayer plaintiffs therefore bring this suit both for themselves and in behalf of all other such taxpayers.

(6) That the defendant Charlotte-Mecklenburg Board of Education is a corporate body and a public agency of the State of North Carolina, created and existing under the laws of the State of North Carolina for the purpose of administering and operating the Charlotte-Mecklenburg public school system.

(7) That the defendant William C. Self is employed by the defendant Board of Education as full-time and active Superintendent of the Charlotte-

Mecklenburg school system, under the direction and control of the defendant Board of Education.

(8) That in obedience to the decision of the Supreme Court of the United States, rendered some fifteen years ago in the landmark case of *Brown vs. Board of Education*, the Charlotte-Mecklenburg school system has become and now is a racially unitary system, that is, access to any school in the system is not denied to any child on account of his race or color, and no compulsion to attend any particular school is imposed on any child because of his race or color, and in the Charlotte-Mecklenburg school system thousands of white children and thousands of Negro children are now attending the same schools and are taught in the same class rooms together.

(9) That there are 106 schools in the Charlotte-Mecklenburg school system, with a total enrollment of 84,542 children; that there are Negro children in attendance at all of these schools, except at 8 of them, and these 8 schools where no Negro children are now enrolled have an attendance of only 5,514 children as compared to the 84,542 children in the entire school system.

(10) That white children constitute approximately 71%, and Negro children constitute approximately 29%, of all the children in the Charlotte-Mecklenburg school system, and that thousands of white children and thousands of Negro children attend schools in the Charlotte-Mecklenburg system which have en-

rollments of white children and Negro children in approximately these very proportions.

(11) That, as the plaintiffs are informed and believe, a majority of the 100 largest school systems throughout all parts of the United States, have a lower ratio of white children and Negro children attending the same schools than is the case in the Charlotte-Mecklenburg public school system.

(12) That it has been judicially determined that in the Charlotte-Mecklenburg school system, each year any pupil is at liberty "to request assignment to another school"; that "no reason for transfer need be given"; and that "all transfer requests are honored", unless the school to which transfer is requested is "full".

(13) That it has further been judicially ascertained and determined that, in the Charlotte-Mecklenburg school system, there is "no racial discrimination" in the expenditure of "money" or the "providing" of "facilities"; and no "inequality based upon racial motives" with respect to the "quality" of "teachers", or "books" or "school buildings" or "athletics" or "school fees" or "free lunches" or "elective courses" or the "evaluation of students"; that the Charlotte-Mecklenburg Board of Education has "achieved a degree and volume" of inter-mixing of Negro children and white children in the Charlotte-Mecklenburg schools which is "apparently unsurpassed in these parts"; and that "the performance" of the Charlotte-Mecklenburg Board in this direction has "exceeded"

that of "any school board whose actions have been reviewed in appellate court decisions".

(14) That, as the plaintiffs are informed and believe, and despite all that is hereinabove set forth, the defendants, under the pressure of a Court directive, are about to institute and implement, in the Charlotte-Mecklenburg public school system, a regime under which the principle of disregarding the race and color of school children, and of imposing no restriction upon their choices, decisions or movements because of race or color, is to be abolished and in its place there is to be established and enforced, both now and hereafter, a principle that race and color shall control the assignment, attendance and movement of children in the Charlotte-Mecklenburg public school system, and that this is a compulsion which shall prevail over all other choices, decisions and considerations of any nature.

(15) That, as stated above, under the principle now controlling in the Charlotte-Mecklenburg schools access to any school is not denied to any child on account of his race or color, and compulsion to attend any certain school is not imposed on any child because of his race or color, but under the regime which the defendants are about to institute and implement, access to Charlotte-Mecklenburg schools will be denied, and throughout the future will continue to be denied, to the children who are plaintiffs herein, and to many thousands of other children in Charlotte and Mecklenburg County, solely on account of their

race and color, and compulsion to attend prescribed schools will be imposed, and throughout the future will continue to be imposed, upon the children who are plaintiffs herein, and upon many thousands of other children in Charlotte and Mecklenburg County, solely on account of their race and color.

(16) That such denials and compulsions, on the part of the defendants as agents of the State of North Carolina, against the plaintiffs and all whom the plaintiffs represent, will contravene the provisions of, the Constitution of the United States, of the Constitution of North Carolina, of statutes enacted by the Congress of the United States; of statute enacted by the General Assembly of North Carolina and of ruling made by the Supreme Court of the United States; and that such denials and compulsions will violate and destroy rights, liberties and freedoms assured and guaranteed to the plaintiffs, and to the citizens, residents, parents, children and taxpayers whom the plaintiffs represent, by the said Constitutions and statutes and Supreme Court ruling, namely:

By the Constitution of the United States, which provides, in its Fourteenth Amendment, that:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

By the Constitution of North Carolina, which provides, in its Article I, Section 18, that:

"Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed".

By the United States Civil Rights Act of 1964, which provides, 42 U.S.C. 2000c(b), that:

"'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance".

By the United States Civil Rights Act of 1964, which further provides, 42 U.S.C. 2000c-6(a), that:

"... [N]othing herein shall empower any official or Court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance".

By the General Statutes of North Carolina, which provide, Section 115-176.1, that:

"No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin .... No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins.

Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing".

By the decision of the Supreme Court of the United States in the case of *Brown vs. Board of Education*, which ruled, 347 U. S. 483 and 349 U. S. 294, that:

"[A]dmission to the public schools" shall be determined "on a non-racial basis".

(17) That the plaintiffs are informed and believe, as hereinabove stated, that in setting about to force the above described denials and compulsions upon the plaintiffs, and upon the citizens, residents, parents, children and taxpayers whom the plaintiffs represent, the defendants are acting under the pressure of a Court directive; that with all due respect for any Court directive, the plaintiffs nevertheless earnestly believe that the issues here involved are of wide and fundamental and lasting importance and should be considered and reconsidered to the fullest extent possible by the Courts at all levels, and the plaintiffs believe it to be eminently right and reasonable and appropriate that they, and those whom they represent, who are and will be the persons directly and vitally affected by the denials and compulsions here in question, should be heard with respect to the facts and the allegations and the issues which are now brought forward in this Complaint.

(18) That having hereinabove stated the overall nature and purpose of the denials and compulsions

which are about to be visited upon the plaintiffs, and all whom the plaintiffs represent, and having delineated the provisions of Federal and State Constitutions and of Federal and State statutes and of Supreme Court ruling which will be thereby contravened, the plaintiffs will now set forth particularly the announced specifics and applications of these denials and compulsions.

(19) That the objective of the regime which the defendants are about to institute and implement in the Charlotte-Mecklenburg schools is declared to be "that pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels [shall] have about the same proportion of black and white students"; that in order to accomplish this objective, the defendants are preparing to put into effect a combination of pupil assignment plans known as the Board Plan and the Finger Plan; that under such plans, the children named above, and thousands of other children in the Charlotte-Mecklenburg schools, white and black, will be forced to leave the schools where they now attend, and the communities where they live, and travel, by bus or other means of transportation, to other schools far distant and there be forced to attend school daily —all against their will—and all solely because of the race and color into which they were born.

(20) That such force and compulsion upon the children named above, and all whom they represent, will take from their liberties and their freedoms and

will shackle upon them instead a governmental dictation based wholly on race and color.

(21) That such force and compulsion will moreover constitute a gross discrimination as between those who are forced to move and those who are not.

(22) That with respect to the aforesaid pupil assignment plans and the implementing of them, it has been specified that "freedom of choice or freedom of transfer" shall "not be allowed" by the defendants to any child if the choice or the transfer has any effect of diminishing the degree of racial integration in any school; that freedom to choose only one way and freedom to transfer only in one direction is obviously not freedom at all, but the abolishment of freedom.

(23) That further with respect to the pupil assignment plans which are about to be imposed and implemented by the defendants, it has been specified "that no school be operated with an all-black or predominately black student body"; that there is no similar requirement with regard to all-white or predominately white schools; and that this beyond denial is racially discriminatory.

(24) That not only are the defendants about to establish and implement, in the Charlotte-Mecklenburg schools, the denials and compulsions hereinabove described, but it is also specified that they will enforce such denials and compulsions as "a continuing program" and will "maintain a continuing control over the race of children in each school, such as was

done for many decades before *Brown vs. Board of Education*; that the regime now about to be instituted is thus openly and avowedly a return to the principle of governing the admission and attendance of children in public schools according to race, which prevailed in many States prior to the Supreme Court's decision in *Brown vs. Board of Education* and which was thought to have been outlawed forever by that decision; and that not only are the chains of racial ratios thus about to be fastened upon the plaintiffs and those whom they now represent, but "continuing control" is to be maintained to assure that such ratios of race shall be locked upon all succeeding generations of children in the Charlotte-Mecklenburg schools, perpetually.

(25) That although the assignment and attendance of children in the public schools of North Carolina were determined and controlled according to race in years past, and although the effects of that denial of freedom were undoubtedly more adverse to Negro children than to white children, that is no reason now to reimpose the same wrongful principle of denial of freedom because of race upon white children and ironically and at the same time upon Negro children as well.

(26) That the pupil assignment and attendance plans which the defendants are now about to institute and implement will impose major inconveniences and burdens upon the children named above, and thousands of other children whom they represent, and will

bring about serious and harmful disruptions in their lives.

(27) That, as the plaintiffs are informed and believe, the implementing of the said pupil assignment and attendance plans will necessitate the purchase or rental by the defendants of large numbers of buses or other vehicles of transportation, and the abandonment of school buildings and the construction of other school buildings; and the extensive dismantling and replacement of school equipment and facilities—all at a cost of millions of dollars of public funds; that, as the plaintiffs are further informed and believe, the expenditure of public funds by the defendants in the initiation and launching of such plans and programs during the current year alone will range between $3,000,000.00 and $4,000,000.00, and such expenditure in succeeding years will greatly expand upon such amounts; that the expenditure of such funds will wrongfully injure and damage the plaintiff taxpayers and all other taxpayers of Charlotte and Mecklenburg County, in that the defendants, by such expenditures, will be, without lawful authority, diverting and misusing tax monies collected from the said taxpayers, or monies raised upon the credit of taxes to be collected from the said taxpayers, and will thereby wrongfully and unlawfully deprive the taxpayers of Charlotte and Mecklenburg County of their property in the amount of such expenditures.

(28) That above and beyond all other factors here pertinent, however, the paramount consideration is

that the defendants are about to establish and implement a system under which freedom is to be taken from the Charlotte-Mecklenburg school children, and in its place there is to be imposed governmental control of school assignments and school attendance strictly on the basis of the race and color of these children; and that this contravenes the provisions of Federal and State Constitutions and of Federal and State statutes, as set forth above, and is in direct and specific conflict with the fundamental ruling of the United States Supreme Court that "admissions to the public schools" shall be determined "on a non-racial basis".

(29) That unless the defendants are restrained by Court order, the denials and compulsions which they are about to impose and implement will work irreparable injury, for which there can be no adequate remedy or recompense at law, upon the plaintiffs, and the citizens, residents, parents, children and taxpayers whom the plaintiffs represent, in their lives, their property and their most cherished liberties.

WHEREFORE, the plaintiffs pray the Court for a temporary order restraining and enjoining the defendants from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which the children named above, or any children in the City of Charlotte or Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any pre-

scribed Charlotte-Mecklenburg public school because of their race or color.

And the plaintiffs pray that at the hearing upon such temporary order, the same be continued in force and effect until the trial of this cause upon the merits.

As to all issues properly triable before a jury, the plaintiffs respectfully request such jury trial.

WM. H. BOOE

WHITEFORD S. BLAKENEY

Attorneys for the Plaintiffs

[Verifications Omitted]

INJUNCTIVE ORDER ISSUED BY THE SUPERIOR COURT OF MECKLENBURG COUNTY, NORTH CAROLINA

NORTH CAROLINA	In The General Court of Justice
MECKLENBURG COUNTY	Superior Court Division

MRS. ROBERT LEE MOORE, ET ALS,
Plaintiffs

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools,
Defendants

} ORDER

THIS CAUSE coming before the undersigned upon the Complaint which has been duly verified by the plaintiffs, and the same having been fully considered;

And the Court being of the opinion that a temporary injunction and restraining order, as hereinafter set forth, should be issued by this Court;

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED:

That the defendants are hereby enjoined and restrained from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which any children in the City of Charlotte or

Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed Charlotte-Mecklenburg public school because of their race or color.

As a condition of this Order, it is directed that the plaintiffs shall file in the Office of the Clerk of Superior Court of Mecklenburg County, North Carolina, a Bond, approved by the said Clerk, in the amount of $1,000.00, by which the plaintiffs undertake and agree that in the event it is finally determined that this Order should not have been issued, then they will pay to the defendants such damages, up to the aforesaid amount, as the defendants may have suffered by reason of the issuance of this Order.

And the defendants are hereby directed to appear, in person or by counsel, before the Judge presiding over the Civil Term of Superior Court of Mecklenburg County, North Carolina, at the Mecklenburg County Court House, in Charlotte, North Carolina, on the 3rd day of March, 1970, at 9:30 o'clock A. M., and then and there show cause, if any they have, as to why this Order should not be continued in force and effect until the merits of this cause have been determined.

This 22nd of February, 1970.

s/ FRANK W. SNEPP

Judge of Superior Court

DEFENDANTS' PETITION FOR REMOVAL OF ACTION FROM STATE COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

MRS. ROBERT LEE MOORE, et al, *Plaintiffs,* vs. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of the Charlotte-Mecklenburg Schools, *Defendants;*	PETITION FOR REMOVAL Civil Action No. 2631

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA:

Petitioners, the Charlotte-Mecklenburg Board of Education, and William C. Self, Superintendent of Charlotte-Mecklenburg public schools, defendants herein, respectfully state to the Court:

1. On February 22, 1970, the plaintiffs instituted against the defendants in the Superior Court of Mecklenburg County, North Carolina, a civil action of which this court has original jurisdiction, in that rights or claims of right arising out of the Constitution and laws of the United States, statutes of the United States and other rights are alleged in the complaint as among the grounds asserted for this action:

2. Copies of all process, pleadings and orders which have been served upon the defendants in this action are attached hereto. A cash bond is also attached hereto, guaranteeing that the defendants will pay all costs and disbursements incurred by reason of the removal of this action into this court, in the event it is hereafter determined that this action was not removable to this court or was improperly removed to this court.

3. No pleadings or papers have been filed by the defendants in the aforesaid action.

4. The defendants are filing a copy of this petition with the Clerk of Superior Court of Mecklenburg County, North Carolina, and the defendants are giving written notice of the filing of this petition, and are furnishing a copy of the petition with such notice to the plaintiffs herein.

WHEREFORE, your petitioners, the defendants herein, request this court to assume full jurisdiction over the cause herein, as provided by law.

WILLIAM J. WAGGONER

William J. Waggoner
Weinstein, Waggoner, Sturges,
Odom and Bigger
1100 Barringer Office Tower
Charlotte, North Carolina

BENJ. S. HORACK

Benj. S. Horack
Ervin, Horack and McCartha
806 East Trade Street
Charlotte, North Carolina

[Verification Omitted]

PLAINTIFF'S APPLICATION FOR INJUNCTIVE ORDER IN UNITED STATES DISTRICT COURT

[Caption Omitted In Printing]

NOW COME the plaintiffs above-named and respectfully present to the Court:

1. That the General Statutes of North Carolina, Section 115-176.1, provide, as is set forth in the Complaint herein, that no person shall be "excluded from", nor "assigned" to or "compelled to attend", any public school in North Carolina "on account of" his race or color, nor "for the purpose of creating" any "balance or ratio" of race or color.

2. That, as the plaintiffs assert in their Complaint herein, such provisions are in harmony with the Constitution of the United States and specifically with the provisions of the Fourteenth Amendment of the Constitution, as interpreted and ruled by the Supreme Court of the United States in the case of *Brown vs. Board of Education*, 347 U. S. 483 and 349 U. S. 294.

3. That the said North Carolina statute contains a proviso, however, which purports to authorize a public school board to make such "assignment or reassignment" of pupils as it in its "sole discretion" may deem needful.

4. That as the plaintiffs are informed and believe, the defendants are implementing and putting into effect, in the Charlotte-Mecklenburg public schools,

certain plans and programs under which children living in Charlotte and Mecklenburg County, including the minor plaintiffs, will be excluded from schools and compelled to attend other schools solely on account of their race and color.

5. That it may be deemed that in such actions, the defendants are authorized and supported by the aforesaid proviso in the aforesaid statute, which permits them to assign and reassign school children in their "sole discretion"; that in such respect and in such application, however, the said proviso conflicts with the United States Constitution and specifically with the provisions of the Fourteenth Amendment to the Constitution, as interpreted and ruled by the Supreme Court of the United States in the case of *Brown vs. Board of Education* referred to above, 347 U.S. 483 and 349 U.S. 294.

WHEREFORE, the plaintiffs pray the Court for an injunctive order restraining and enjoining the operation and execution of the aforesaid proviso of the North Carolina statute above referred to, and any action by the defendants or any other State agents implementing the application and operation of the said statutory proviso as described above, upon the ground that the said statutory proviso as thus applied and implemented is unconstitutional; and to such end, the plaintiffs pray for the convening of a District Court of three Judges, to consider this Application upon all the matters and circumstances which

are set forth herein and in the Complaint filed by the plaintiffs in this cause, such Court being provided and required in such case by the laws and statutes of the United States.

WM. H. BOOE

WHITEFORD S. BLAKENEY

Attorneys for the Plaintiffs

DEFENDANTS' APPLICATION FOR INJUNCTIVE ORDER IN UNITED STATES DISTRICT COURT

[Caption Omitted In Printing]

NOW COME the defendants and respectfully show to the Court:

1. That this Court has heretofore directed these defendants to put into operation and effect certain plans and programs relating to the assignment and reassignment of pupils in the Charlotte-Mecklenburg public schools, in an action now pending in this Court entitled *James E. Swann, et al, v. Charlotte-Mecklenburg Board of Education, et al.*

2. That in order for the defendants to put such plans and programs into operation and effect, it will be necessary for the defendants compulsorily to require large numbers of pupils, because they are white children, to attend schools other than those which they now attend, and it will likewise be necessary for the defendants compulsorily to require large numbers of pupils, because they are Negro children, to attend schools other than those which they now attend.

3. That the plaintiffs, in their complaint herein, have asserted that such actions and requirements by the defendants will violate certain statutes enacted by the General Assembly of North Carolina, General Statutes of North Carolina, Section 115-176.1, and by

the Congress of the United States, 42 U.S.C. 2000c(b) and 42 U.S.C. 2000c-6(a), which statutes are more particularly set forth in plaintiffs' complaint.

4. That upon the basis of the said statutes, among other things, and their asserted conflict with the actions which this Court has directed the defendants to take, the Superior Court of Mecklenburg County, North Carolina, has restrained and enjoined the defendants from taking such actions.

5. That if the actions which this Court has directed the defendants to take are required by the Constitution of the United States, as the defendants understand this Court to have ruled in directing such actions, then the aforesaid statutes conflicting with this Court's ruling are also in conflict with the Constitution of the United States.

6. That the defendants do not know where the law rightly and truly is upon this conflict, and in an effort to resolve this dilemma, the defendants respectfully call upon the Court for an injunctive order enjoining and restraining the enforcement, operation and execution of the aforesaid statutes, and any action by State or Federal officers in the enforcing or executing or carrying out of said statutes, the ground of such injunctive order being the unconstitutionality of the said statutes.

7. The plaintiffs in the *Swann* case now seek to enjoin the enforcement of State court order which would have the effect of enjoining the enforcement and execution of said state statute on the grounds of its supposed unconstitutionality, which must be passed upon by a three-judge district court pursuant to 28 U.S.C. 22 81 et seq.

8. The desegregation order of this court in the *Swann* case does not effectively charge the defendant Board of Education with the daily task of going forward with plans for implementation of the Court directed plan; rather it specifies results to be accomplished on days certain. The order of the Superior Court specifically and directly prohibits any further action by the Board of Education with reference to implementation of the Court directed plan. The defendant Board of Education is therefore unable to proceed unless and until the order of the Honorable Frank Snepp is vacated, modified or dissolved. By virtue of removal, the Superior Court Judge is without power to take such action.

9. The United States District Court of the Western District of North Carolina is the ~~only court that~~ can resolve the defendants' dilemma by modifying, amending or vacating such order. To do so, in view of the plain meaning of the North Carolina General Statute 115-176.1, the United States District Court would be required to hold the North Carolina statute

unconstitutional or inapplicable. In view of the action of this Court in the Swann case in convening a three-judge court for this very purpose, the North Carolina statute cannot be considered inapplicable.

10. The defendants are not privileged to ignore any order issued by any court until such time as such orders may be lawfully modified, vacated or reversed. It appears that the most reasonable action would lie in bringing this matter on for hearing before a three-judge court pursuant to 28 U.S.C. 22 81 et seq.

11. In view of the fact that any relief to the defendants from the conflicting orders of this Court and of the Superior Court of Mecklenburg County, North Carolina, will involve consideration by the District Court of the constitutionality of said State statute and if same is determined to be unconstitutional, the issuance of restraining order in connection therewith, then only a three-judge court may properly proceed.

WHEREFORE, the defendants respectfully request the convening of a three-judge district court to pass upon the constitutionality of North Carolina General Statute 115-176.1 and 42 U.S.C. 2000c(b) and 42 U.S.C. 2000c-6(a) and further to pass upon the issuance of any interlocutory or permanent injunction restraining the enforcement, operation or execution thereof.

Respectfully submitted this 2nd day of March, 1970.

/s/ WILLIAM J. WAGGONER

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/s/ BENJ. S. HORACK

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ORDER OF UNITED STATES DISTRICT JUDGE, SUSPENDING STATE COURT INJUNCTIVE ORDER PENDING FINAL DETERMINATION BY THREE-JUDGE COURT OR BY SUPREME COURT

[Caption Omitted In Printing]

On Sunday, February 22, 1970, Judge Frank W. Snepp, in *Moore, et al, v. Charlotte-Mecklenburg Board of Education, et al,* a suit filed in the Superior Court of Mecklenburg County, North Carolina, signed a restraining order against the defendants. The order is of record. It appears to have been filed at 10:16 P.M. on Sunday night, February 22, 1970.

On Friday, February 27, 1970, the defendant Board of Education had a meeting. Without any inquiry of this court, the Board staff were instructed to comply with the state court order and to stop work on compliance with the order previously entered by this Court.

On February 28, 1970, counsel for all interested parties were notified that a hearing would be conducted on March 2, 1970, on motions to set aside or to restrain the effect of the Snepp order. Counsel for plaintiffs in the Moore case did not appear, but sent word through secretaries by telephone that they were occupied elsewhere.

The School Board attorneys have also filed on March 2, 1970, in the Swann case, Civil Action No. –

1974, a motion which, although it does not clearly say so, amounts to a request by the Board to this court to relieve the Board of the burden of Judge Snepp's order so that it will not interfere with the preparation and implementation of a desegregation plan.

The Fourth Circuit Court of Appeals has now, on March 5, 1970, issued an order which postpones pending appeal the implementation of the clustering, pairing and cross-bussing provisions of the February 5, 1970 order, but which directs the implementation of the rest of the February 5 order according to its terms. It would appear that the Board should without question follow the order of the Court of Appeals, rather than consider itself hampered by the Snepp order. Nevertheless, in order that there may be no possible question about the effect of the Snepp order henceforward, it is now, in the discretion of the court and in the furtherance and protection of the jurisdiction and orderly processes of this court, and pursuant to applicable statutes, ORDERED, ADJUDGED AND DECREED, that the order heretofore signed by Judge Snepp in Civil Action No. 2631 in the Superior Court of Mecklenburg County be, and it is hereby suspended and held in abeyance and of no force and effect pending the final determination by a three-judge court or by the Supreme Court of the issues which will be presented to the three-judge court on March 24, 1970.

IT IS FURTHER ORDERED, that the *Moore Case*, No. 2631, be referred to the three-judge court of March 24, 1970, for such hearing and determination as that court may find proper.

This the 6th day of March, 1970.

/s/ JAMES B. MCMILLAN

James B. McMillan
United States District Judge

DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT

[Caption Omitted In Printing]

The defendants, answering the complaint of the plaintiffs, allege and say:

1. The allegations contained in Paragraphs 1 through 5 are admitted upon information and belief.

2. The allegations contained in Paragraphs 6 through 14 are admitted.

3. With respect to the allegations contained in Paragraph 15, it is admitted that under the principle now controlling in the Charlotte-Mecklenburg schools, access to any school is not denied to any child on account of his race or color, and compulsion to attend any certain school is not imposed on any child because of his race or color, but under the direction of the Court, the defendants are about to institute and implement a plan for desegregation which will deny access to Charlotte-Mecklenburg schools to the plaintiffs and other children in this county, solely on account of their race and color and they will be compelled to attend schools now and in the future solely on account of their race and color. Except as herein admitted, the allegations contained in Paragraph 15 are denied.

4. With respect to the allegations contained in Paragraph 16, the factual information is admitted and

these defendants are neither required to admit nor deny conclusions stated therein.

5. With respect to the allegations contained in Paragraph 17 of the complaint, it is admitted that the defendants are acting upon the pressure of the Court directive with respect to further desegregation of the schools served by the system and that the issues here involved are of wide and fundamental and lasting importance and should be considered and reconsidered to the fullest extent possible by the courts at all levels. Except as herein admitted, the allegations contained in Paragraph 17 are denied and for further answer, the issues sought to be raised by the plaintiffs have and will continue to be raised by the defendants.

6. The allegations contained in Paragraph 18 do not contain factual statements and therefore are neither admitted nor denied.

7. The allegations contained in Paragraph 19 are admitted.

8. With respect to the allegations contained in Paragraph 20, it is admitted that the plan for desegregation ordered by the District Court will take from the plaintiffs and all whom they represent certain of their educational liberties and freedoms solely on account of race and color.

9. The allegations contained in Paragraph 21 are admitted.

10. The factual allegations contained in Paragraph 22 are admitted, the defendants being neither required to admit or deny the conclusions stated therein.

11. The factual allegations contained in Paragraph 23 of the complaint are admitted, the defendants being neither required to admit nor deny the conclusions stated therein.

12, The factual allegations contained in Paragraph 24 of the complaint are admitted, the defendants being neither required to admit nor deny conclusions therein stated.

13. The allegations contained in Paragraphs 25 and 26 are admitted.

14. The allegations contained in Paragraph 27 of the complaint are admitted except it is denied that the defendants will voluntarily without lawful authority divert and misuse tax monies collected from the said taxpayers, or monies raised upon the credit of taxes to be collected from said taxpayers.

15. That the allegations contained in Paragraph 28 of the complaint are admitted.

16. As to allegations contained in Paragraph 29, the same are denied, the true facts being that the defendants are exercising all legal rights and remedies available to ensure that the rights of no one will be violated under the Constitution and laws of the United States and North Carolina.

WHEREFORE, the defendants pray the Court to deny the relief sought by the plaintiffs and to dismiss their action and further that the defendants have and recover their costs.

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NOTIFICATION AND REQUEST FOR DESIGNATION OF THREE-JUDGE COURT

[Caption Omitted In Printing]

It appears from the Application filed by the plaintiffs (copy of which is attached hereto) that this matter does or may involve the constitutionality or the constitutionality of the application of a state statute, or a portion thereof, and that pursuant to Title 28 U.S.C.A., it should be heard by a district court of three judges.

NOW, THEREFORE, it is respectfully requested that the Chief Judge of the United States Court of Appeals for the Fourth Circuit designate two other judges, at least one of whom shall be a circuit judge, to serve with the undersigned district judge as members of the court to hear and determine the action.

This the 23rd day of March, 1970.

/s/ JAMES B. MCMILLAN

James B. McMillan
United States District Judge

DESIGNATION OF THREE-JUDGE COURT

[Caption Omitted In Printing]

It appearing to the undersigned Chief Judge of the Fourth Judicial Circuit of the United States that a civil action as above-entitled is now pending in the United States District Court for the Western District of North Carolina, and that a motion and application for restraining order and other relief have been filed in this action which do or may raise the question of the constitutionality of Section 115-176.1 of the General Statutes of North Carolina, commonly spoken of as the "anti-bussing" statute and which application and motion also raise other questions; and that application for relief as set out in the pending motion was made to James B. McMillan, United States District Judge for the Western District of North Carolina, who has notified the undersigned, pursuant to Section 2284 of Title 28, United States Code, of the pendency of such application to the end that a court of three judges may be constituted in accordance with Section 2281, Title 28, United States Code.

Now, therefore, I do hereby designate Honorable J. Braxton Craven, Jr., United States Circuit Judge, Fourth Judicial Circuit, and Honorable John D. Butzner, Jr., United States Circuit Judge, Fourth Judicial Circuit, to serve with the Honorable James B. McMillan in the hearing and determination of the above-entitled action, as provided by law, the three to constitute a district court of three judges as provided by Section 2284, Title 28, United States Code.

This the 24th day of March, 1970.

CLEMENT HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

PLAINTIFFS' REQUEST FOR ADMISSIONS (EXHIBITS THERETO ATTACHED ARE PRINTED IN SEPARATE VOLUME, ENTITLED SUPPLEMENT TO APPENDIX)

[Caption Omitted In Printing]

As is authorized by the Federal Rules of Civil Procedure, the plaintiffs respectfully request of the defendants that they admit the truth of the following statements and the genuineness of the following documents:

1. That the attached map, shown on Page 8B of The Charlotte Observer of March 22, 1970, is a substantially accurate depiction of some of the restructured elementary school districts in the Charlotte-Mecklenburg public school system, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970.

2. That the attached sheets are substantially accurate individual depictions of the restructured elementary school districts shown on the aforesaid map, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970.

3. That the depictions in "1" and "2" above, do not show the elementary school districts in the Charlotte-Mecklenburg public school system which are both restructured and "paired" with other elementary school districts, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970.

4. That the attached map, shown on Page 31 of the March 16, 1970, issue of the U. S. News & World Report, is a substantially accurate depiction of the "pairing" of schools in the Charlotte-Mecklenburg public school system for purposes of assigning children to schools outside their districts, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970.

5. That the restructuring of school districts in the Charlotte-Mecklenburg public school system, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970, is shaped and controlled by racial considerations, that is, by a conscious and purposeful effort to obtain and to require, by assignment within such restructured districts, as nearly as possible a ratio of 70% white children and 30% black children in each school.

6. That the "pairing" of schools in the Charlotte-Mecklenburg public school system for purposes of assigning children to schools outside their districts, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970, is shaped and controlled by racial considerations, that is, by a conscious and purposeful effort to obtain and to require, by assignment of children outside their districts, as nearly as possible a racial ratio of 70% white children and 30% black children in each school.

WM. H. BOOE

W. S. BLAKENEY

Attorneys for the Plaintiffs

DEFENDANTS' ANSWER TO REQUEST FOR ADMISSIONS

[Caption Omitted In Printing]

Pursuant to the Federal Rules of Civil Procedure, the defendant, the Charlotte-Mecklenburg Board of Education, responding serially to the six requests, respond as follows:

1. With respect to the request contained in Paragraph 1, the same is admitted.

2. Request for Admission No. 2 is admitted.

3. The statement contained in Request No. 3 is admitted.

4. With respect to Request No. 4, the map referred to is a substantially accurate depiction of the pairing of schools in the Charlotte-Mecklenburg public school system for the purpose of assigning pupils to schools outside of their districts, as authorized and ordered to be put into effect by the United States District Court Decree of February 5, 1970. In making this admission, the defendants state that said map is schematic and does not appear to be accurate to scale.

5. Statements contained in Request No. 5 are admitted.

6. Statement contained in Request No. 6 is admitted and as the orders of the District Court so indicate.

Respectfully submitted this 23rd day of March, 1970.

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[Verification Omitted]

OPINION OF THREE-JUDGE COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil No. 1974

JAMES E. SWANN, et al., *Plaintiffs,*

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KEERY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, *Defendants,*

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON

ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE, *Additional Parties-Defendant.*

Civil No. 2631

MRS. ROBERT LEE MOORE, et al., *Plaintiffs,*

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools, *Defendants.*

THREE-JUDGE COURT

(Heard March 24, 1970 Decided April 29, 1970.)

Before CRAVEN and BUTZNER, Circuit Judges, and McMILLAN, District Judge.

Mr. J. LeVonne Chambers (Chambers, Stein, Ferguson & Lanning) and James M. Nabrit, III, for Plaintiffs in No. 1974; Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) and Mr. Benjamin Horack, for Defendants in No. 1974; Mr. Ralph Moody, Deputy Attorney General, and Mr.

Andrew A. Vanore, Jr., Assistant Attorney General, for State Defendants and Additional Parties-Defendant in No. 1974; and Mr. William H. Booe and Mr. Whiteford S. Blakeney, for other Additional Parties-Defendant in No. 1974.

Mr. William H. Booe and Mr. Whiteford S. Blakeney for Plaintiffs in No. 2631; and Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) for Defendants in No. 2631.

CRAVEN, Circuit Judge:

This three-judge district court was convened pursuant to 28 U.S.C. § 2281, et seq. (1964), to consider a single aspect of the above-captioned case: the constitutionality and impact of a state statute, N. C. Gen. Stat. § 115-176.1 (Supp. 1969), known as the anti-bussing law, on this suit brought to desegregate the Charlotte-Mecklenburg school system. We hold a portion of N. C. Gen. Stat. § 115-176.1 unconstitutional because it may interfere with the school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment.

I.

On February 5, 1970, the district court entered an order requiring the Charlotte-Mecklenburg School Board to desegregate its school system according to a court-approved plan. Implementation of the plan could require that 13,300 additional children be

bussed.[1] This, in turn, could require up to 138 additional school buses.[2]

Prior to the February 5 order, certain parties filed a suit, entitled *Tom B. Harris, G. Don Roberson, et al. v. William C. Self, Superintendent of Charlotte-Mecklenburg Schools and Charlotte-Mecklenburg Board of Education*, in the Superior Court of Mecklenburg County, a court of general jurisdiction of the State of North Carolina. Part of the relief sought was an order enjoining the expenditure of public funds to purchase, rent or operate any motor vehicle for the purpose of transporting students pursuant to a desegregation plan. A temporary restraining order granting this relief was entered by the state court, and, in response, the *Swann* plaintiffs moved the district court to add the state plaintiffs as additional parties defendant in the federal suit, to dissolve the state restraining order, and to direct all parties to cease interfering with the federal court mandates. Because it appeared that the constitutionality of N. C. Gen. Stat. § 115-176.1 (Supp. 1969) would be in question, the district court requested designation

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[1]On March 5, 1970, the Fourth Circuit Court of Appeals stayed that portion of the district court's order requiring bussing of students pending appeal to the higher court.

[2]There is a dispute between the parties as to the additional number of children who will be bussed and as to the number of additional buses that will be needed. For our purposes, it is immaterial whose figures are correct. The figures quoted are taken from the district judge's supplemental findings of fact, filed March 21, 1970.

of this three-judge court on February 19, 1970. On February 25, 1970, the district judge granted the motion to add additional parties. Meanwhile, on February 22, 1970, another state suit, styled *Mrs. Robert Lee Moore, et al. v. Charlotte-Mecklenburg Board of Education and William C. Self, Superintendent of Charlotte-Mecklenburg Schools*, was begun. In this second state suit, the plaintiffs also requested an order enjoining the school board and superintendent from implementing the plan ordered by the district court on February 5. The state court judge issued a temporary restraining order embodying the relief requested, and on February 26, 1970, the *Swann* plaintiffs moved to add Mrs. Moore, *et al.*, as additional parties defendant in the federal suit. On the same day, the state defendants filed a petition for removal of the *Moore* suit to federal court. On March 23, 1970, the district judge requested a three-judge court in the removed *Moore* case, and this panel was designated to hear the matter. All the cases were consolidated for hearing, and the court heard argument by all parties on March 24, 1970.

II.

N. C. Gen. Stat. § 115-176.1 (Supp. 1969) reads:

> Assignment of pupils based on race, creed, color or national origin prohibited.—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national orgin. No school attendance

district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

It is urged upon us that the statute is far from clear and may reasonably be interpreted several different ways.

(A) Plaintiffs read the statute to mean that the school board is prevented from complying with its duty under the Fourteenth Amendment to establish a unitary school system. See, *e.g., Green v. County School Bd. of New Kent County,* 391 U.S. 430, 439 (1968). In support of this contention, plaintiffs argue that the North Carolina General Assembly passed § 115-176.1 in response to an April 23, 1969, district court order, which required the school board to submit a plan to desegregate the Charlotte schools for the 1969-70 school year. Under plaintiffs' interpretation of the statute, the board is denied all desegration tools except nongerrymandered geographic zoning and freedom of choice. Implicit in this, of course, is the suggestion that zoning and freedom of choice will be ineffective in the Charlotte context to disestablish the asserted duality of the present system.

(B) The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race. Implicit in this argument is that any school system is *per se* unitary if it is zoned according to neighborhood patterns that are not the result of officially sanctioned racial discrimination. Although the Attorney General emphasizes the expression of state policy by the Legislature in favor of the neighborhood school concept, he recognizes, of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus, the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation to nongerrymandered geographic zoning and freedom of choice.

(C) The school board's interpretation of the statute is more ingenious. The board concedes that the statute prohibits assignment according to race, assignment to achieve racial balance, and involuntary bussing for either of these purposes, but contends that the facial prohibitions of the statute

only apply to prevent a school board from doing more than necessary to attain a unitary system. The argument is that since the statute only begins to operate once a unitary system has been established, it in no way interferes with the board's constitutional duty to desegregate the schools. Counsel goes on to insist that Charlotte-Mecklenburg presently has a unitary system and, therefore, that the state court constitutionally applied the statute to prevent further unnecessary racial balancing.

(D) Plaintiffs in the *Harris* suit contend (1) that in 42 U.S.C. §§ 2000c(b) and 2000c-6(a)(2) (1964)[3] Congress expressly prohibited assignment and bussing to achieve racial balance, (2) that to compel a child to attend a school on account of his

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[3] § 2000c.

As used in this subchapter—

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

§ 2000c-6(a):

(2) [P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

race or to compel him to be involuntarily bussed to achieve a racial balance violates the principle of *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954), and (3) that N.C. Gen. Stat. § 115-176.1 merely embodies the principle of the neighborhood school in accordance with *Brown* and the Civil Rights Act of 1964. We may dispose of the first contention at once. The statute "cannot be interpreted to frustrate the constitutional prohibition [against segregated schools]." *United States v. School Dist. 151 of Cook Co.*, 404 F. 2d 1125, 1130 (7th Cir. 1968).

(E) Plaintiffs in the *Moore* suit argue that the district court order of February 5, 1970, was in contravention of *Brown* and, therefore, that the state court order in their suit was justified. However, the *Moore* plaintiffs also argue that certain parts of the second and third paragraphs in the state statute are unconstitutional because they give the school board the authority to assign children to schools for whatever reasons the board deems necessary or sufficient. The *Moore* plaintiffs interpret these portions of the statute as permitting assignment and bussing on the basis of race contrary to *Brown* and the Fourteenth Amendment.

III.

Federal courts are reluctant, as a matter of comity and respect for state legislative judgment and discretion, to strike down state statutes as unconstitutional, and will not do so if the statute reasonably can

be interpreted so as not to conflict with the federal Constitution. But to read the statute as innoculously as the school board suggests would, we think, distort and twist the legislative intent. We agree with plaintiffs and the Attorney General that the statute limits the remedies otherwise available to school boards to desegrate the schools. The harder question is whether the limitation is valid or conflicts with the Fourteenth Amendment. We think the question is not so easy, and the statute not so obviously unconstitutional, that the question may lawfully be answered by a single federal judge, see *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Bailey v. Patterson*, 369 U.S. 31 (1962), and we reject plaintiffs' attack upon our jurisdiction. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965); C. Wright, Law of Federal Courts § 50 at 190 (2d ed. 1970).

In *Green v. County School Bd. of New Kent Co.*, 391 U.S. 430 (1968), the Supreme Court declared that a school board must take effective action to establish a unitary, nonracial system, if it is not already operating such a system. The Court neither prohibited nor prescribed specific types of plans, but, rather, emphasized that it would judge each plan by its ultimate effectiveness in achieving desegregation. In *Green* itself, the Court held a freedom-of-choice plan insufficient because the plan left the school system segregated, but stated that, under the circumstances existing in New Kent County, it appeared that the school board could achieve a unitary system

either by simple geographical zoning or by consolidating the two schools involved in the case. 391 U.S. at 442, n. 6. Under *Green* and subsequent decisions, it is clear that school boards must implement plans that work to achieve unitary systems. *Northcross v. Bd. of Ed. of the Memphis City Schools*, U.S. , 38 L.W. 4219 (1970); *Alexander v. Holmes Co. Bd. of Ed.*, 396 U.S. 19 (1969). Plans that do not produce a unitary system are unacceptable.

We think the enunciation of policy by the legislature of the State of North Carolina is entitled to great respect. Federalism requires that whenever it is possible to achieve a unitary system within a framework of neighborhood schools, a federal court ought not to require other remedies in derogation of state policy. But if in a given fact context the state's expressed preference for the neighborhood school cannot be honored without preventing a unitary system, it is

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The reach of the Court's mandate is not yet clear:

> [A]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

Northcross v. Bd. of Ed. of the Memphis City Schools, — U. S.—, 38 L.W. at 4220 (1970) (Chief Justice Burger, concurring). For our purposes, it is sufficient to say that the mandate applies to require "reasonable" or "justifiable" solutions. *See generally* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965).

the former policy which must yield under the Supremacy Clause.

Stated differently, a statute favoring the neighborhood school concept, freedom-of-choice plans, or both can validly limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system. That it may or may not depends upon the facts in a particular school system. The flaw in this legislation is its rigidity. As an expression of state policy, it is valid. To the extent that it may interfere with the board's performance of its affirmative constitutional duty to establish a unitary system, it is invalid.

The North Carolina statute, analyzed in light of these principles, is unconstitutional in part. The first paragraph of the statute reads:

> No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown* I).

The third paragraph of the statute reads:

> The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

This paragraph merely allows the school board non-invidious discretion to assign students to schools for valid administrative reasons. As we read it, it does not relate to race at all and, so read, is constitutional.

The fourth paragraph provides:

> The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

This paragraph relieves school boards from compliance with the statute where they are implementing voluntarily adopted freedom-of-choice plans within their systems. It does not require the boards to adopt freedom of choice in any particular situation, but leaves them free to comply with their constitutional duty by any effective means available, including, where it is appropriate, freedom of choice. So interpreted, the paragraph is constitutional.

The second paragraph of the statute contains the constitutional infirmity. It reads:

> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The first sentence of the paragraph presents no greater constitutional problem than the third and fourth paragraphs of the statute, discussed above. It allows school boards to establish a geographically zoned neighborhood school system, but it does not require them to do so. Consequently, this sentence does not prevent the boards from complying with their constitutional duty in circumstances where zoning and

neighborhood school plans may not result in a unitary system. The clause in the first sentence permitting assignment for "any other reason" in the board's "sole discretion" we read as meaning simply that the school boards may assign outside the neighborhood school zone for noninvidious administrative reasons. So read, it presents no difficulty. The second and third sentences are unconstitutional. They plainly prohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially "balance" the school system. *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968), *Brown v. Bd. of Ed. of Topeka*, 349 U.S. 294 (1955) (*Brown* II), and *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown* I), require school boards to consider race for the purpose of disestablishing dual systems.

The Constitution is not color-blind with respect to the affirmative duty to establish and operate a unitary school system. To say that it is would make the constitutional principle of *Brown* I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction that boards must take steps adequate to abolish dual systems. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking

affirmative steps to desegregate its system, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear, see *Northcross v. Bd. of Ed. of the Memphis City Schools*, —U.S.—, 38 L.W. at 4220 (1970) (Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.

Although we hold these statutory prohibitions unconstitutional as violative of equal protection, it does not follow that "bussing" will be an appropriate remedy in any particular school desegregation case. On this issue we express no opinion, for the question is now on appeal to the United States Court of Appeals for the Fourth Circuit and is not for us to decide.

It is clear that each case must be analyzed on its own facts. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article VI, clause 2 of the Constitution).

V. [sic]

As we have no cause to doubt the sincerity of the various defendants, the plaintiffs' motion to hold them in contempt for interference with the district court's orders and their request for an injunction against enforcement of the statute will be denied. We believe the defendants, including the state court plaintiffs, will, pending appeal, respect this court's judgment, which applies statewide with respect to the constitutionality of the statue.

Several of the parties have moved to be dismissed from the case, alleging various grounds in support of their motions. Because of the view we take of this suit and the limited relief we grant, the motions to dismiss become immaterial. The school board is undeniably a proper party before the court on the constitutional issue, since it is a party to the desegregation

suit. We can, therefore, consider and adjudge the validity of the statute, regardless of the position of the other parties. That we consider the substantive arguments of all the parties in no way harms those who have moved to be dismissed.

An appropriate judgment will be entered in accordance with this opinion.

FINAL JUDGMENT OF THREE-JUDGE COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA, CHARLOTTE DIVISION

CIVIL NO. 1974

JAMES E. SWANN, et al., *Plaintiffs,*

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, *Defendants,*

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R.

CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Civil No. 2631

MRS. ROBERT LEE MOORE, et al.,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools,

Defendants.

FINAL JUDGMENT

Upon reconsideration of our memorandum opinion filed April 28, 1970, we withdraw Part V.

It is now ORDERED, ADJUDGED and DECREED that the following portion of N. C. General Statute 115-176.1 prohibiting assignment by race and bussing be and hereby is held unconstitutional, void, and of no effect:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in con-

travention of this article is prohibited, and public funds shall not be used for any such bussing.

All parties are hereby enjoined from enforcing, or seeking the enforcement of, the foregoing portion of the statute.

Plaintiffs' motion to hold defendants in contempt is denied; the various motions to dismiss are denied.

This 22 day of June, 1970.

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

JOHN D. BUTZNER, JR.
United States Circuit Judge

JAMES B. MCMILLAN
United States Circuit Judge [sic]

PLAINTIFFS' NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

MRS. ROBERT LEE MOORE, ET AL,
Plaintiffs
vs.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools,
Defendants

Civil Action No. 2631

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

On June 22, 1970, a "Final Judgment" was entered by the three-judge district court in this cause.

The plaintiffs hereby give notice of appeal, and do hereby appeal, from such Judgment to the Supreme Court of the United States.

This appeal is taken, and this Notice of Appeal is entered, pursuant to the provisions of 28 U.S.C. 1253.

This 23rd day of June, 1970.

WM. H. BOOE

W. S. BLAKENEY

Attorneys for the Plaintiffs

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 16 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 444

MRS. ROBERT LEE MOORE, ET AL,

Appellants

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL,

Appellees

On Appeal From A Decision Of A Three-Judge Court In The United States District Court For The Western District Of North Carolina

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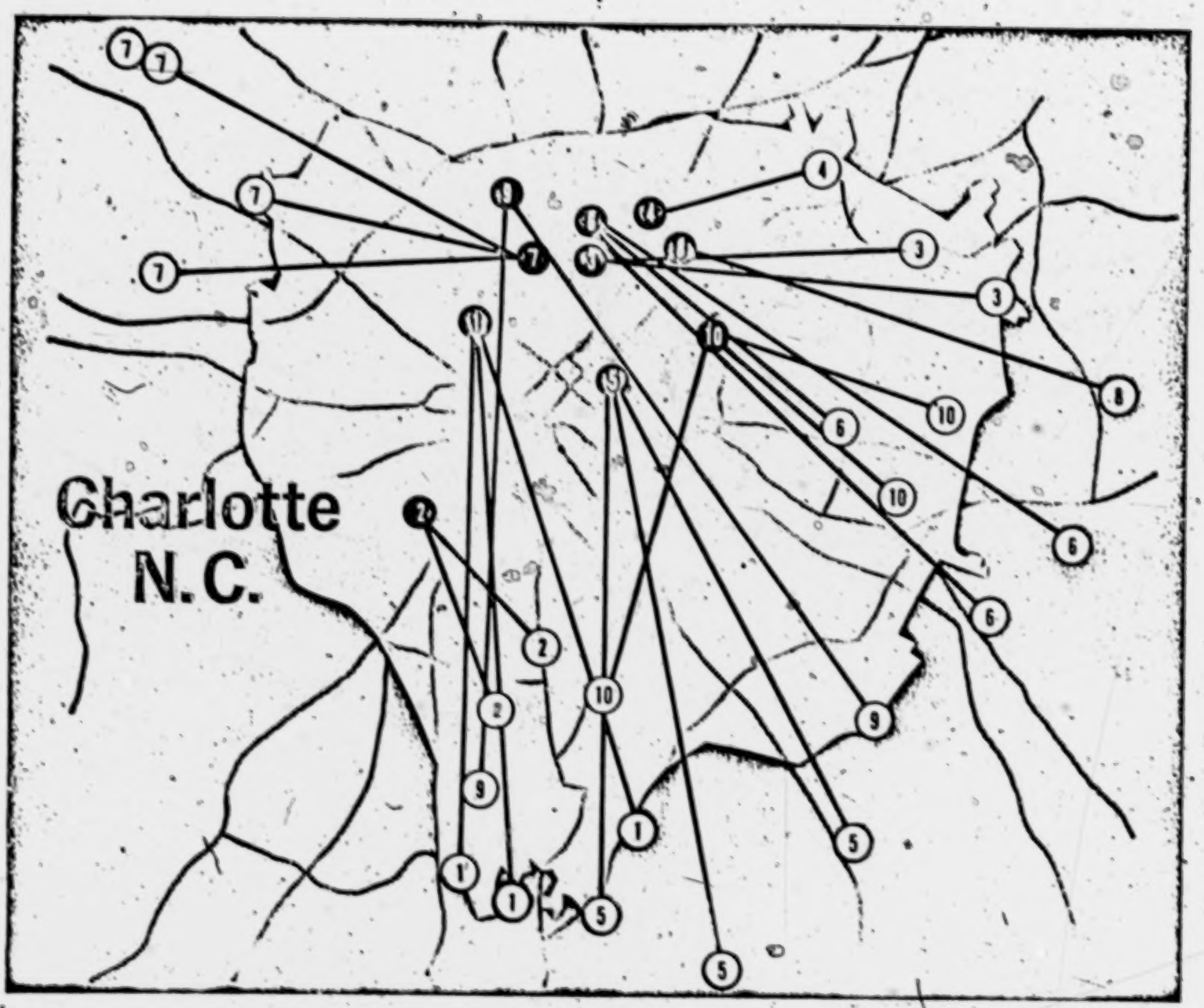
—EXHIBITS—
SUPPLEMENT TO APPENDIX

INDEX

Schematic Depiction Of "Pairing" Of Schools "In The Charlotte-Mecklenburg Public School System For Purposes Of Assigning Children To Schools Outside Their Districts", As Referred To In Plaintiffs' Request For Admissions

Individual Maps Showing "Restructured Elementary School Districts" In The Charlotte-Mecklenburg Public School System, As Referred To In Plaintiffs' Request For Admissions

Composite Map Showing "Some Of The Restructured Elementary School Districts In The Charlotte-Mecklenburg Public School System", As Referred To In Plaintiffs' Request For Admissions



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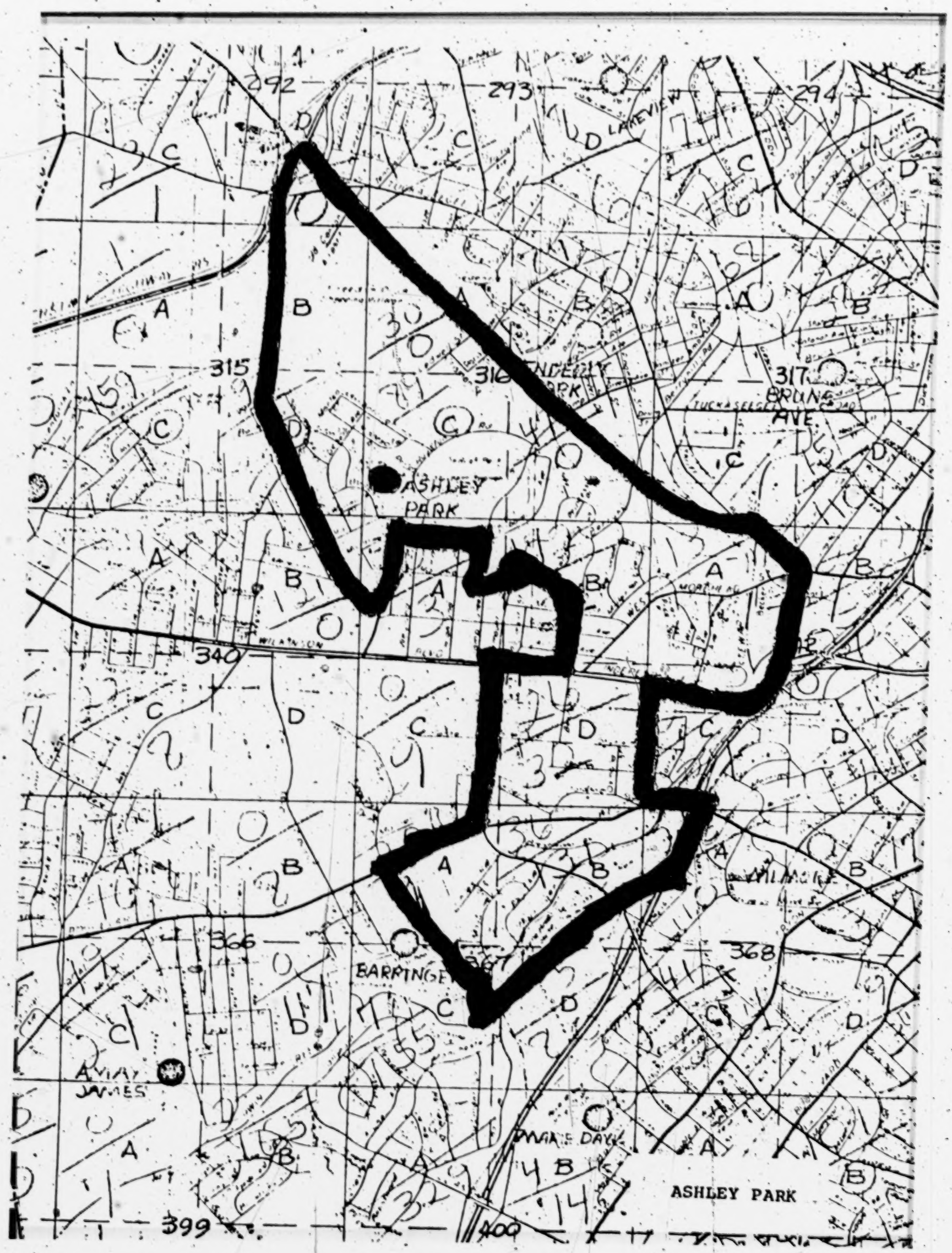
A MAZE OF BUS ROUTES TO INTEGRATE CHARLOTTE SCHOOLS

This map shows the complex busing patterns required under a federal court order to get more racial integration in public schools of the Charlotte area. Ten schools in the heavily black inner city—marked with black circles—will exchange pupils with 24 mostly white schools—white circles—in the fringes of the city or in suburbs of surrounding Mecklenburg County. The bus routes, between schools bearing the same number on the map, will average 15 miles in length and, it is estimated, will require an average travel time of about 1 hour 10 minutes each way.

ASHLEY PARK SCHOOL ATTENDANCE AREA

Beginning at the intersection of Freedom Drive and I-85 continue in an easterly direction along Freedom Drive to Morehead and continue to Independence Boulevard. West on Independence to the 1600 block of Independence Boulevard. South to the intersection of Fordham Road and West Boulevard (this line will cross Skyview Road and Bethel Road at the 1100 block). Then east along West Boulevard to the Crosstown Boulevard. Southwest on the boulevard to Irwin Creek. Southwest along Irwin Creek to Barringer Drive. North on Barringer Drive, including both sides. Continue north on Barringer to Beechnut Road. Turn northwest and continue to West Boulevard at Lotus Lane, including all of Beechnut Road. East on West Boulevard not to include any students along West Boulevard, to Remount Road. North on Remount Road to Wilkinson Boulevard. East on Wilkinson Boulevard to Berryhill Road. North on Berryhill Road to Marlowe Avenue. West on Marlowe Avenue to Camp Green Street. North at Camp Green Street, not to include any students on Camp Green Street, to drainage ditch. West along drainage ditch to Dublin Road to Lumina Avenue. South along Lumina Avenue, to include both sides of Lumina, to Ashley Road, North on Ashley Road to Tuckaseegee and continuing in a straight line to the beginnins point of Freedom Drive and I-85.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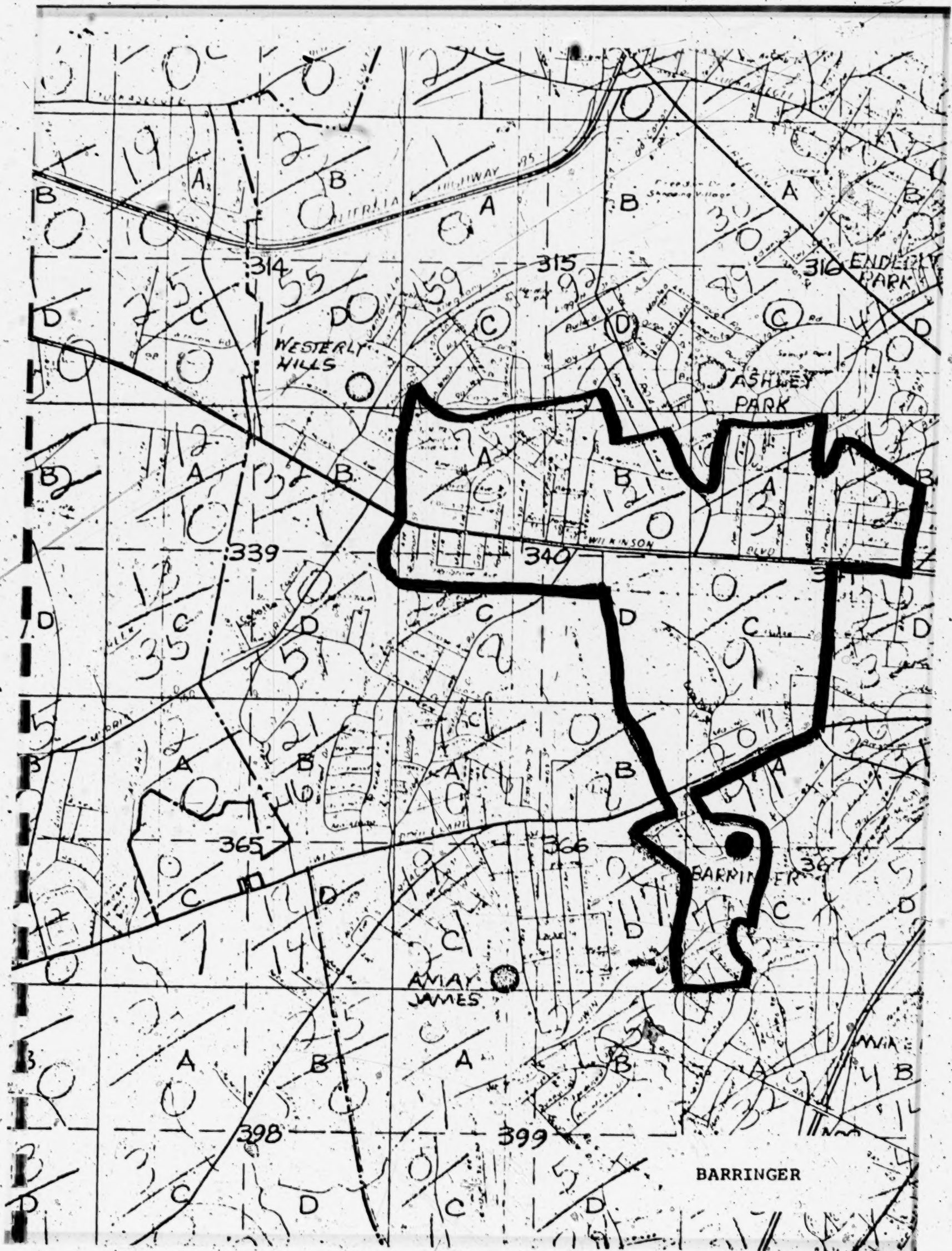
LAKEVIEW
ASHLEY PARK
BRUNS AVE.
BARRINGER
ASHLEY PARK

BARRINGER SCHOOL ATTENDANCE AREA

Begin at intersection of Sargeant Drive and Comstock Drive and go south to intersection of Seaman Drive and Darrow Lane. East to Comstock, continuing to intersection of Archer Avenue and Penrose Lane. Northeast to Barfield Drive. Continue on west side of Barfield to Sargeant Drive. Continue east on Sargeant Drive taking both sides of Sargeant Drive to end of street. North and cross Phillips Park to the east boundary of the school property (Phillips Creek). Continue along the school property line and include Walton Road. East on West Boulevard (both sides) to the intersection of Remount Road and West Boulevard. Divide Remount and continue north to Wilkinson Boulevard. Turn east and continue on Independence Boulevard to Berryhill Road. North on Berryhill (both sides) to Marlowe Avenue. West on Marlowe to Camp Greene Street. North on Camp Greene and on to include Seabrook Drive. West on Seabrook and cross Weyland Avenue. South on the east side of Lumina Avenue and proceed to Ashley Road. North on Ashley Road to Dublin Road. West on north side of Dublin. North on Cartwright to Kempton Place. Southwest on Kempton to Bristol Drive. Include Bristol. Proceed west to the intersection of Sonora Lane and Thornton Road. South by crossing Denver Avenue at Morris Field Drive and include Sparta Street to the Southern Railway. Follow railroad eastward to Donald Ross Road. South on Donald Ross Road to West Boulevard. Cross West Boulevard and include Chelveston Drive and Norwich Place. Continue south to Sargeant Drive and Comstock Drive.


WESTERLY HILLS
ASHLEY PARK
ENDEAVOUR PARK
BARRINGER
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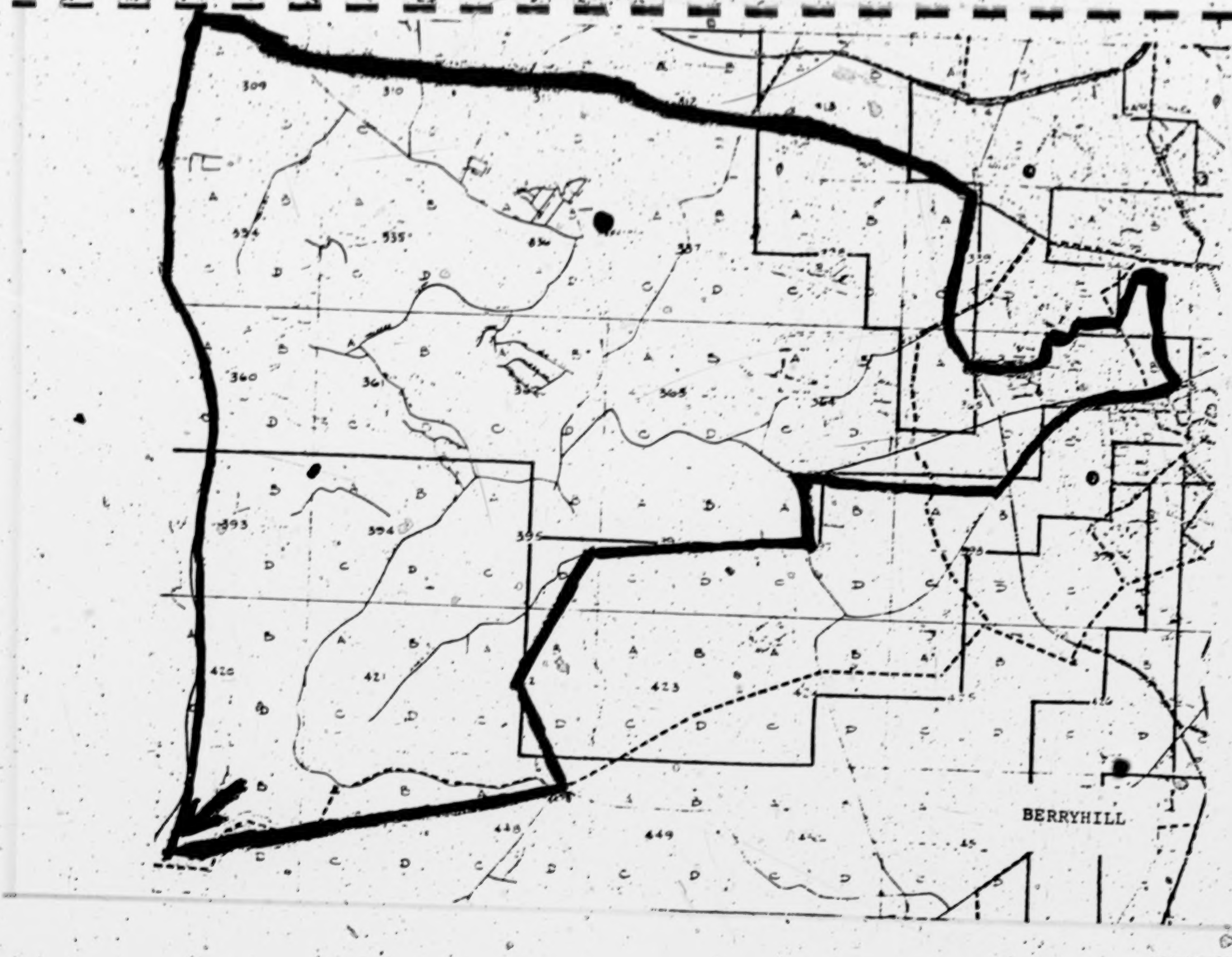
Berryhill Attendance Area:

Northern boundary, Wilkinson Boulevard from Catawba River east to Old Dowd Road. From intersection of Wilkinson Boulevard and Old Dowd Road and Taggart Creek to Morris Field Drive. Follow city limit line southeast to south end of Helena Street to point to exclude all houses on Helena Street. From back of Helena Street east to 3200 Markland Drive. Cross Markland to point between houses numbers 2825 and 2830 on Kenhill Drive. From this point on Kenhill east to Mayfair at intersection of Mayfair and craddock Street. North on Mayfair Avenue to Wingate Street. Wingate Street east to Old Steele Creek Road. Old Steele Creek Road north to Carolina Golf Course (back of Golf Course Lane). North to railroad then east to Donald Ross Road. Donald Ross Road south to West Boulevard. West Boulevard west to Wilmont Road including all of West Boulevard. Wilmont Road south, taking both sides of Wilmont Road south to 3212 Wilmont Road (just below Rebecca Avenue). From point between Rebecca Avenue and 3212 Wilmont Road west to intersection of New Dixie Road (N.C. 160) and Wilmont Road. Wilmont Road south to Cessna Road. From intersection of Wilmont Road and Cessna Road, west to intersection of Dixie Road (N.C. 160) and Garrison Road. From intersection of Garrison and Dixie Roads southwest to end of Markwood Road. From end of Markwood Road southeast to intersection of Dixie Road and Shopton Road. Dixie Road south taking west side of Dixie Road only to Dixie River Road. From Dixie River Road west taking all Dixie River Road, to Browns Cove on Catawba River. Catawba River is western boundary.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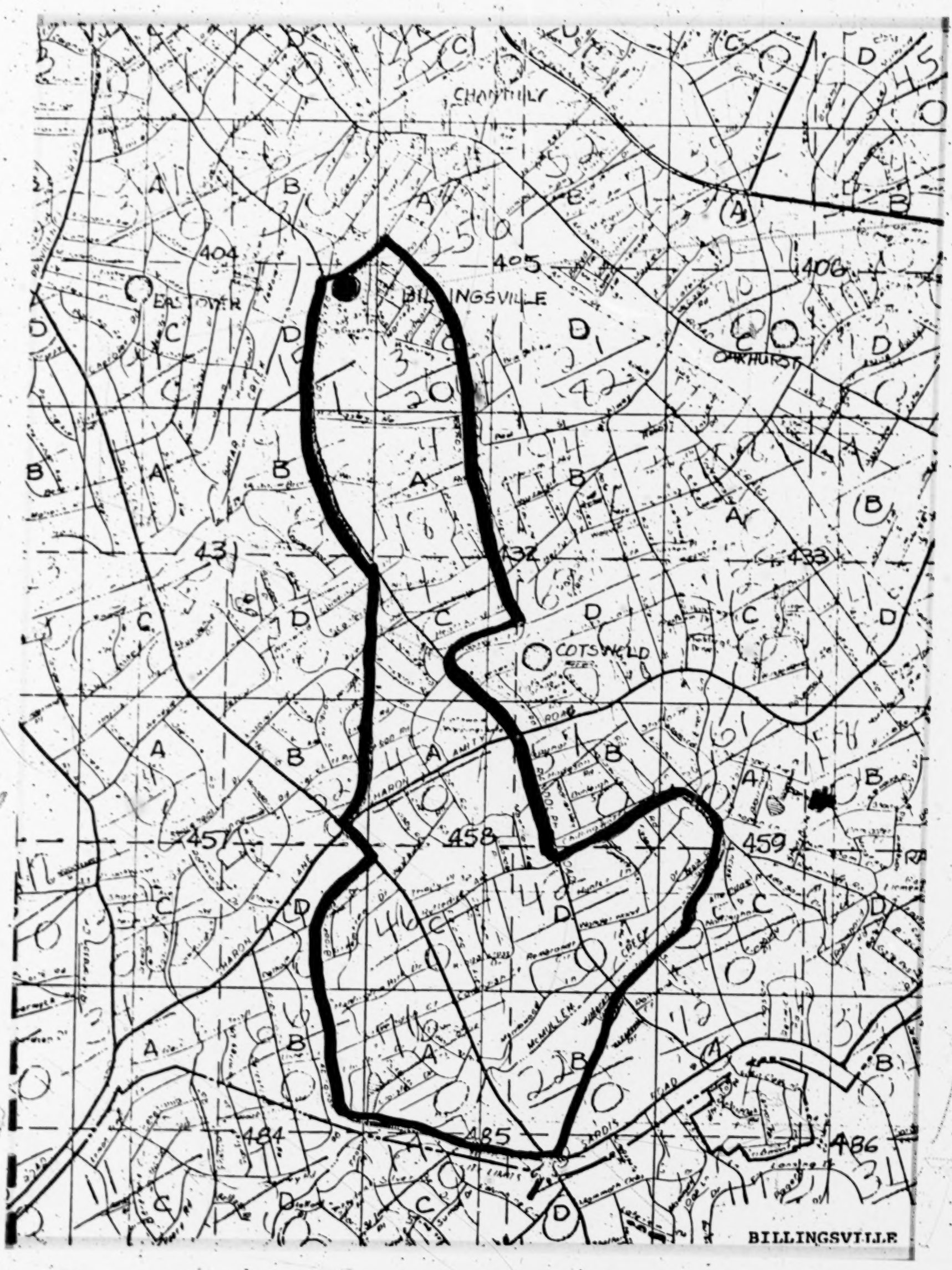
BERRYHILL

BILLINGSVILLE SCHOOL ATTENDANCE AREA

Beginning at Sardis and Providence Roads, cross country east to Shasta Lane through 200 block. Northerly direction to McMullen Creek. Easterly on McMullen Creek to a point between Hunter Lane and Chillingworth to include Hunter Lane, Wonderwood, and all streets off these. North on Randolph to Woodlark. Easterly on Woodlark to McAlway Road. Cross McAlway Road west of Melchor Road and east of Churchill Road. Cross country to include Cascade Circle. North cross country to Burkland, northwest to Skyland Avenue, not to include Burkland Drive west on Skyland to Randolph. South on Randolph Road to Coddington Place to intersection of 1100 block of Aylesford Road. Cross Andover at 1200 block. Cross Exeter at 1400 and include 1400 block of Audubon Road. Cross Ferncliff at 1400 block on the Sharon Amity. Sharon Amity to Providence. South on Providence to Brookridge Lane. Southwest on Brookridge to McMullen Creek then southeast to Providence and Sardis.


CHANTILLY
BILLINGSVILLE
OAKHURST
COTSWOLD
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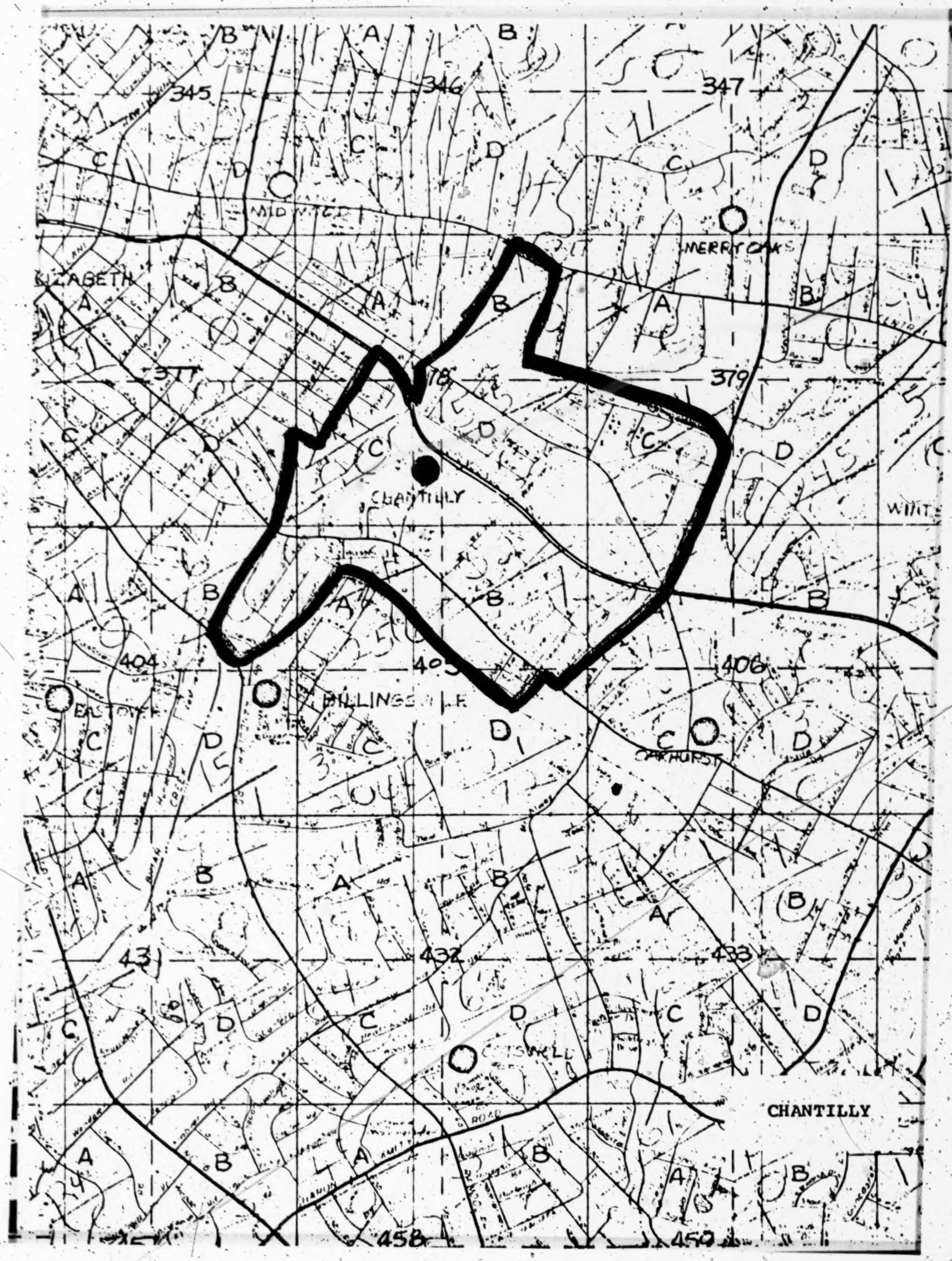
BILLINGSVILLE

CHANTILLY SCHOOL ATTENDANCE AREA

Beginning at the 2900 block of Randolph, cross country to include Sandlewood, Orange and Heflin to Dunn. Follow Dunn to railroad to Stanley. Stanley to Monroe Road. East on Monroe Road to end of Mayview, continue cross country to Independence at Eastway to end of Pinecrest. Cross country to Green Oaks Road. Follow Green Oaks Road to Eastcrest Drive. North on Eastcrest (including both sides) to Central Avenue. Central to Briar Creek, South on Briar Creek to Independence. West on Independence to Lorna. South on Lorna to 2500 block of Kingsbury Drive to include Lorna Circle and 2500 block of Kingsbury. Cross country to Monroe Road. Monroe Road to Briar Creek. Follow creek to Randolph and Randolph to 2900 block.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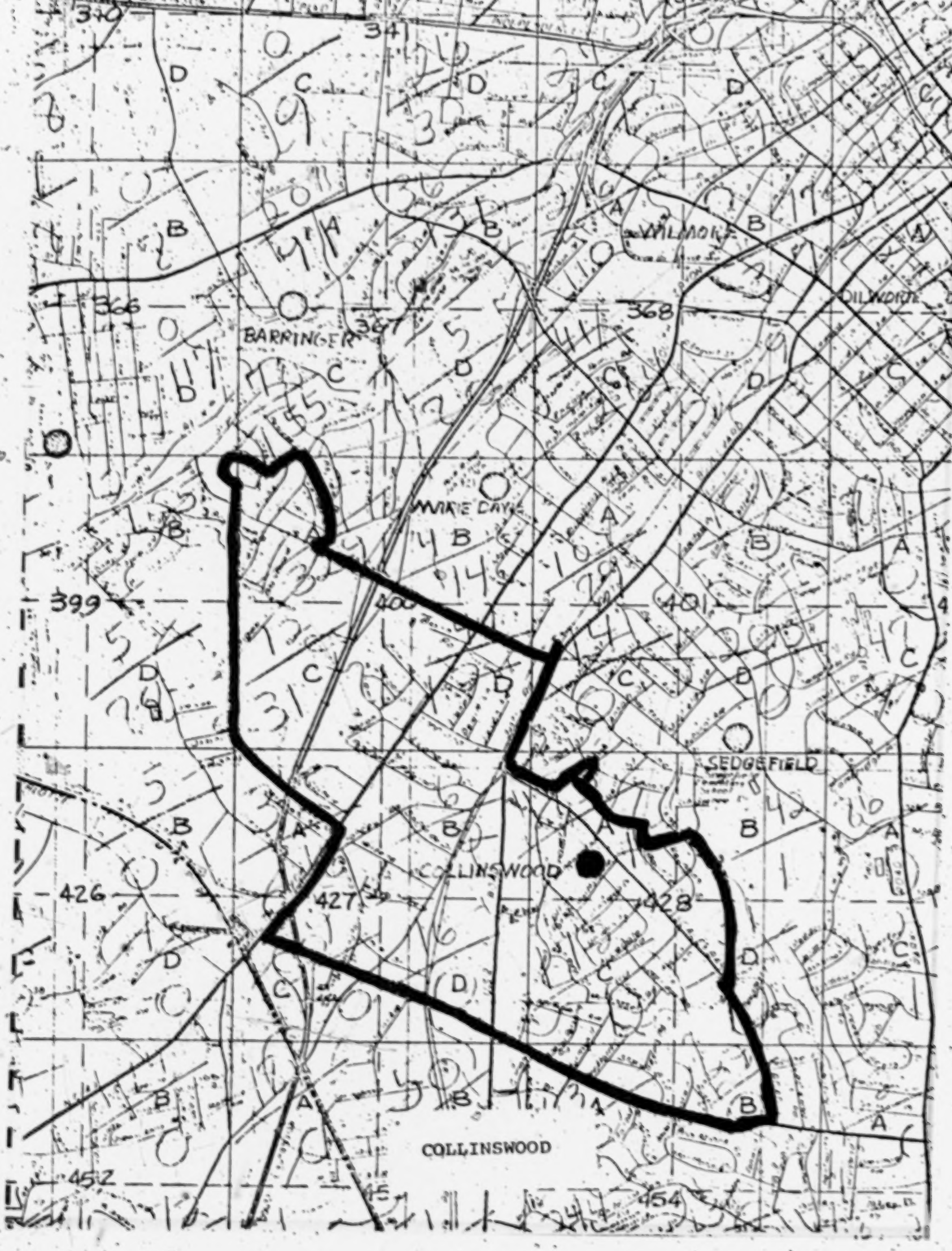
MERRY OAKS
CHANTILLY
OAKHURST
CHANTILLY
ROAD

COLLINSWOOD SCHOOL ATTENDANCE AREA

Beginning at the intersection of South Tryon and Woodlawn Road taking children on the north side of the street only. Continue eastward to the intersection of Scaleybark Road and Woodlawn. Follow the left side of Scaleybark Road northward to a point just beyond Sewickly Avenue at the 900 block of Scaleybark. The line then crosses Scaleybark on the north side of Sewickly across an open field for approximately 600 feet. Turn northwestward to a point on the north side of the intersection of Annlin Avenue and Hartford Avenue. Continue along the 1000 and 1100 blocks of Hartford Avenue including children on both sides of the street, to the intersection of Hartford and Moultrie. The line is the 3700 block of Moultrie, children on both sides of the street, to the intersection of Webster. Continue along the 300 and 400 blocks of Webster, including children on both sides of the street to Conway. The line continues to include children on the 3600 and 3700 block of Conway on both sides of the street. The line follows the 100 and 200 blocks of Scaleybark to South Boulevard.

Proceed from intersection of Scaleybark on South Boulevard, northward to Clanton Road on the left. Follow Clanton Road from the 100 block through the 800 block taking children on the south side only. Proceed 1/2 block on Barringer Drive to Tracy Drive, taking all children on Tracy Drive and Delmar Lane. Turn in a northerly direction to the intersection of Penrose Lane and Manchester Drive. Proceed from this point to the intersection of Archer Drive and Penrose Lane. It does not take in any children on Penrose Lane. Proceed southwestwardly, crossing between the 1000 and 1100 blocks of Comstock, it continues westwardly taking all children on Darrow Lane and then follows the 3700 and 3800 blocks of Seaman Drive, south, taking children on both sides of the road. The line then drops directly south crossing Clanton Road between the 1000 and 1100 blocks and continues directly south to include the 1000 block of Rollingwood, both sides, and both sides of the 3800 block of Manchester and Homewood Place. The line then drops southeastward coming back into the 4300 block of South Boulevard, between Jeremiah Avenue and Orchard Circle. The boundary then continues on the left side of South Tryon, southward to Woodlawn Road.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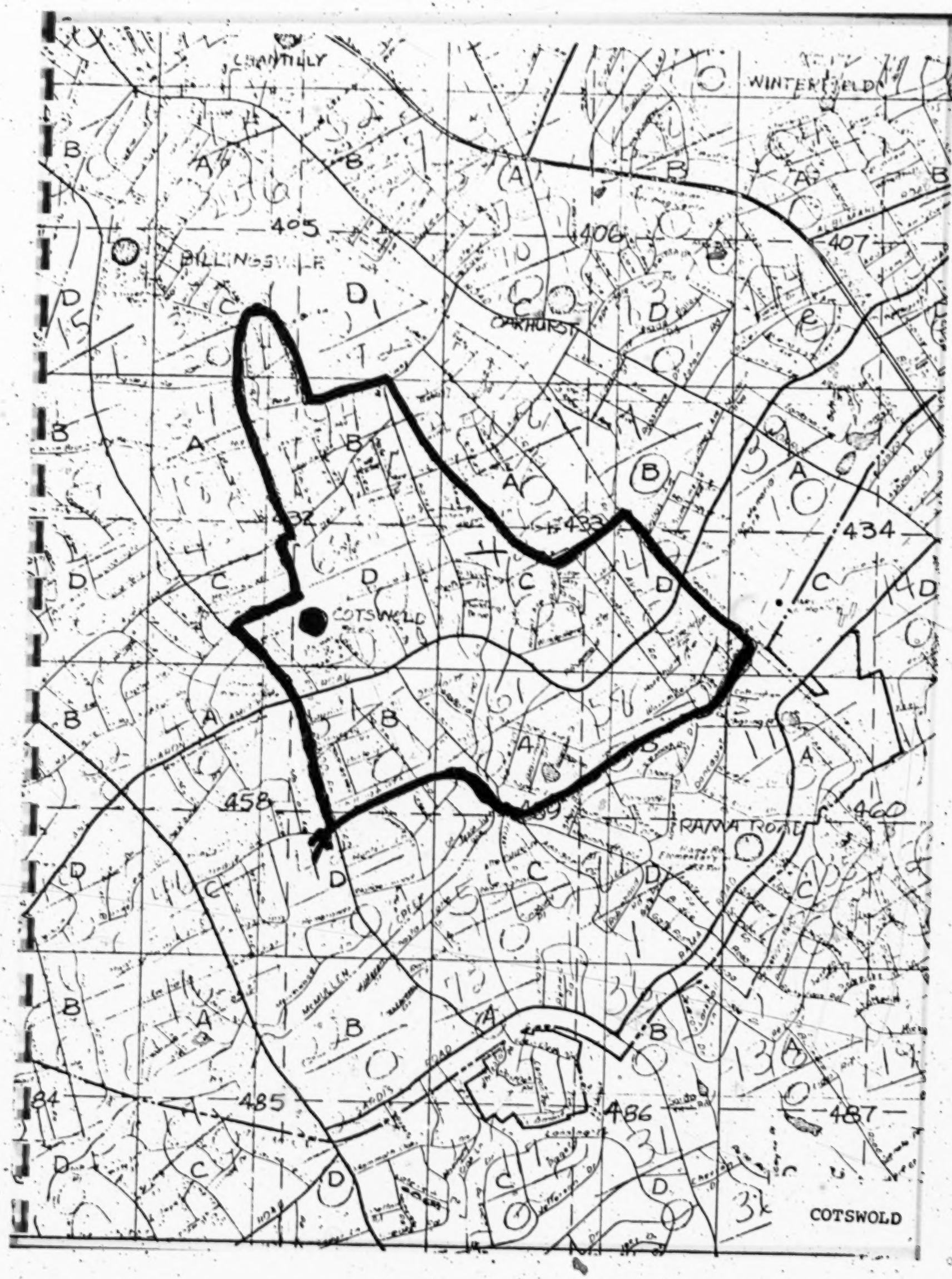
BARRINGER
WILMOIR
WILMOIR
WILKIE CAVE
SEDGEFIELD
COLLINSWOOD
COLLINSWOOD

COTSWOLD SCHOOL ATTENDANCE AREA

Beginning at 4700 block of Randolph between Chillingworth and Hunter Lane to include Chillingworth. Proceed cross country in easterly direction to McMullen Creek. Follow creek to Brook Ford Lane to intersection of Lincrest and Addison to Robinhood Road including all streets west of Robinhood and 5100 block of Addison to McMullen Creek. Follow creek to railroad track. Follow railroad north to Lomax Avenue; down Lomax to include both sides of Lomax past 1200 block. Cross country to 900 block of McAlway Road including all streets to west of 3700 block by Litchfield; McAlway to Beal. West on Beal to Marvin Road; North on Marvin, excluding 3600 to 3400 blocks. In southerly direction to Billingsley Road to Ellington between Jonquil and Burkland, to include Jonquil. West on Billingsley to 600 block. South cross country to Melchor. Follow Melchor to 400 block of McAlway; right on McAlway to Woodlark. Follow Woodlark to Randolph. South on Randolph to 4700 block.


CHANTILLY
WINTERFIELD
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BILLINGSLEE
OAKHURST
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COTSWOLD
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RAMA ROAD
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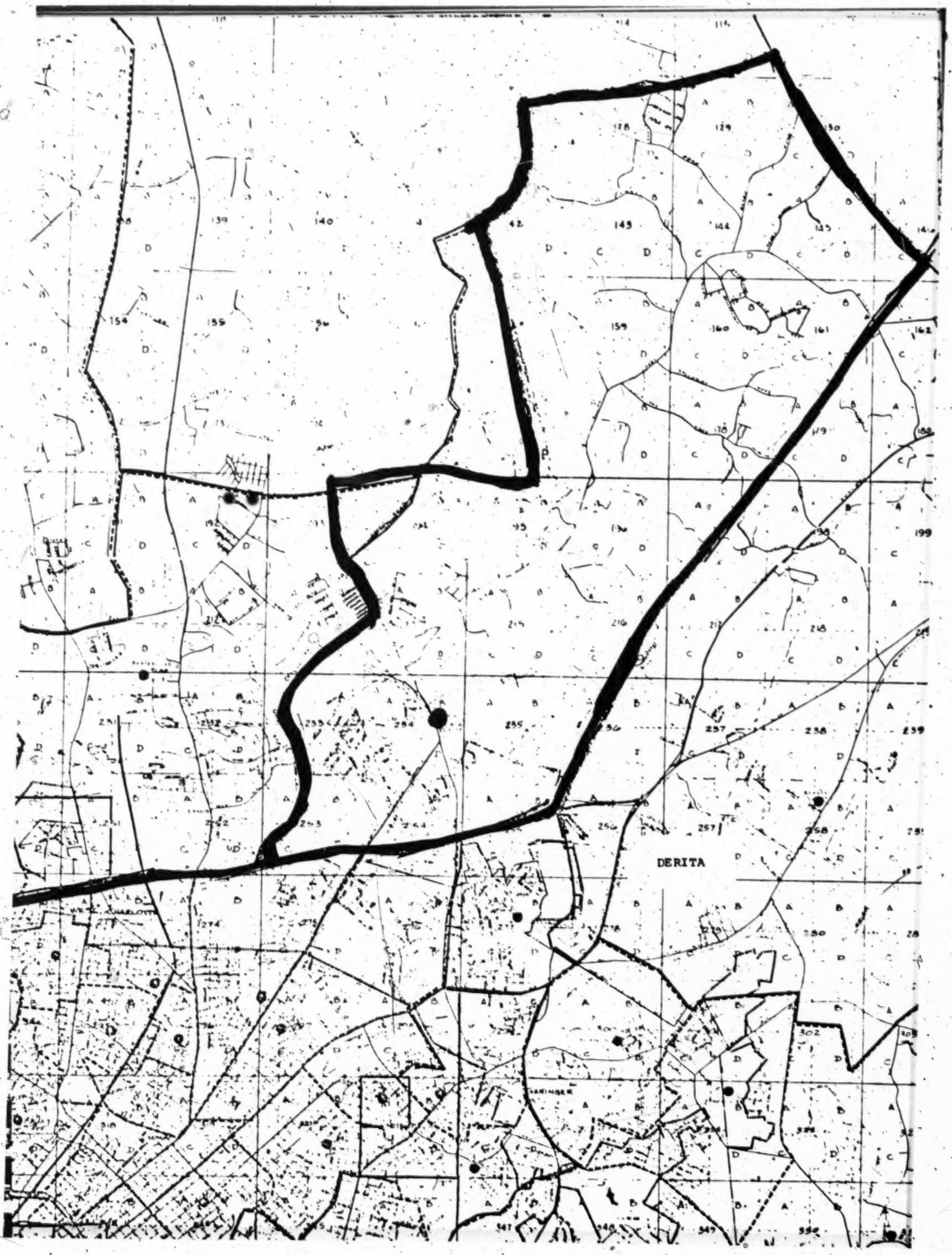
COTSWOLD

DERITA SCHOOL ATTENDANCE AREA

Beginning east of Starita Road on I-85, proceed northeast along I-85 to the Cabarrus County line. From the Cabarrus County line northwest approximately 3 miles. Cross country directly west to Prosperity Church Road .5 mile above intersection of Ridge Road.

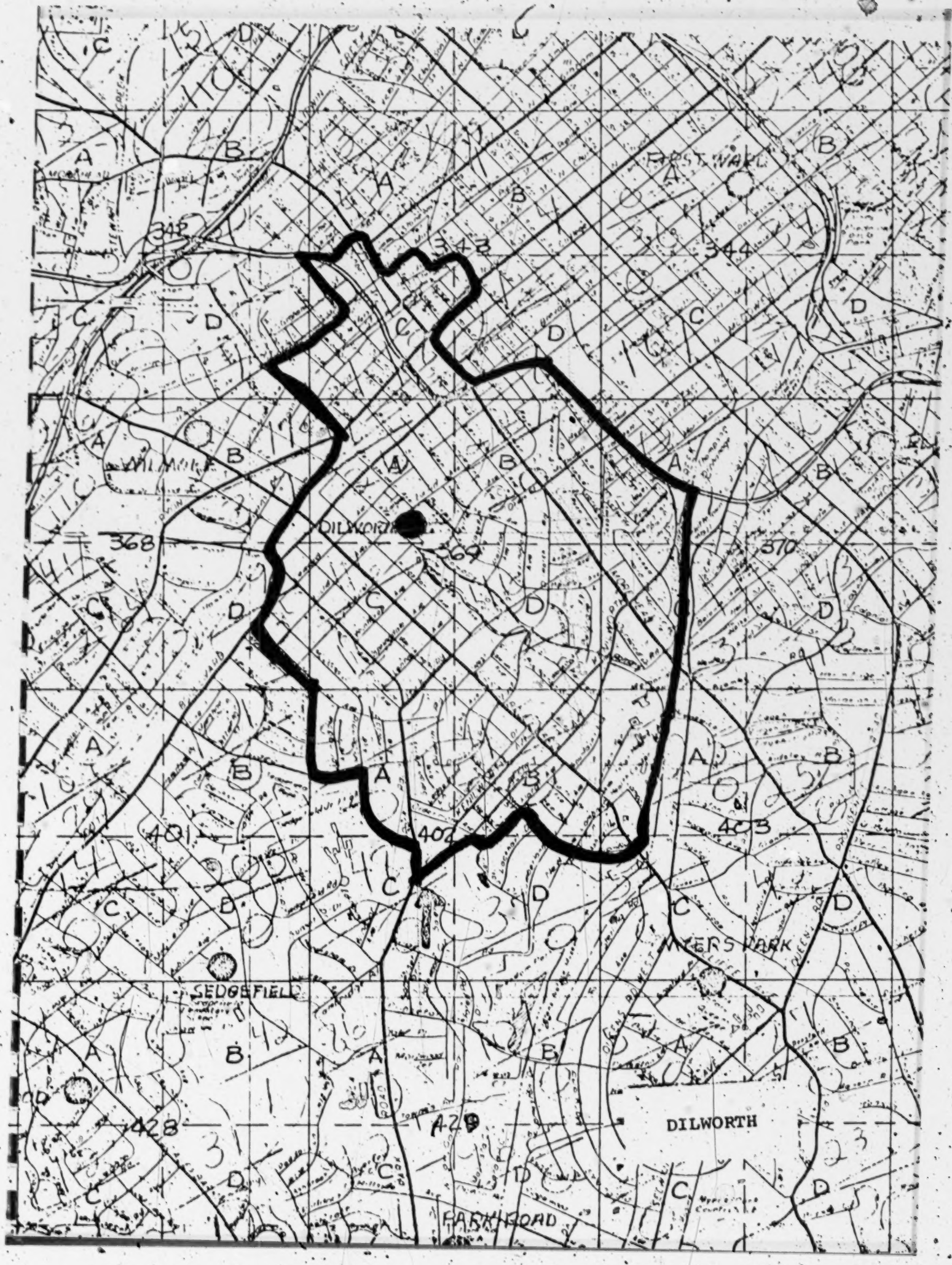
Turn southwest crossing half way between Dearmon Road and remaining half way between Prosperity Church Road and Cheshire Road. Swing west just below the end of David Cox Road crossing Cheshire Road and ending .2 of a mile west of Old Potters Road. South on Old Potters Road to Derita Road.

The middle of Derita Road from Cheshire Road intersection, south .1 of mile past Patton Street. Cross country southwest to a point .2 of a mile East of Perkins Road. Cross country south crossing Nevins Road following a creek on to I-85 east of Starita Road.


DERITA

DILWORTH SCHOOL ATTENDANCE AREA

Beginning at intersection of Park Road and Scott Avenue, follow Scott until it intersects with Ordermore. Go one block on Ordermore and cross Floral Avenue. In a southeasterly direction, cross Cumberland Ave., New Hope and all around Lombardy Circle (to this point you take both sides of the street). Follow Lombardy Circle to the intersection of Blythe Boulevard. Blythe Boulevard to Brunswick Avenue. Right on Brunswick Avenue to the creek. Follow Sugar Creek north to Independence Boulevard. Left on Independence to Morehead Street. Right on Morehead to South Tryon Street. Follow South Tryon in a northeastern direction to Stonewall Street. Left on West Stonewall until it intersects with South Poplar Street. Left on South Poplar to West Hill Street. Follow West Hill to Mint Street. Southwestern on Mint to Morehead Street. Northwest on Morehead to Elderidge Street. Southwest on Elderidge to Independence Boulevard. Follow Independence to Palmer Street. Then in a southeastern direction on Palmer to the intersection of Mint Street. Western direction on Mint to Summit. Southeastern on Summit to Camden Road. Follow Camden in a southern direction to West Tremont. Left on West Tremont to South Boulevard. Follow South Boulevard to Magnolia Avenue. Go in a southeastern direction on Magnolia to Winthrop Avenue. Follow Winthrop in a southern direction to Ideal Way. Cross Ideal Way, taking in both sides of the street, until it intersects at McDonald. Turn right on McDonald and follow McDonald to Park Road. Right on Park Road, one block, until it intersects with Scott Boulevard.


DILWORTH
SEDGEFIELD
MYERS PARK
DILWORTH
PARK ROAD
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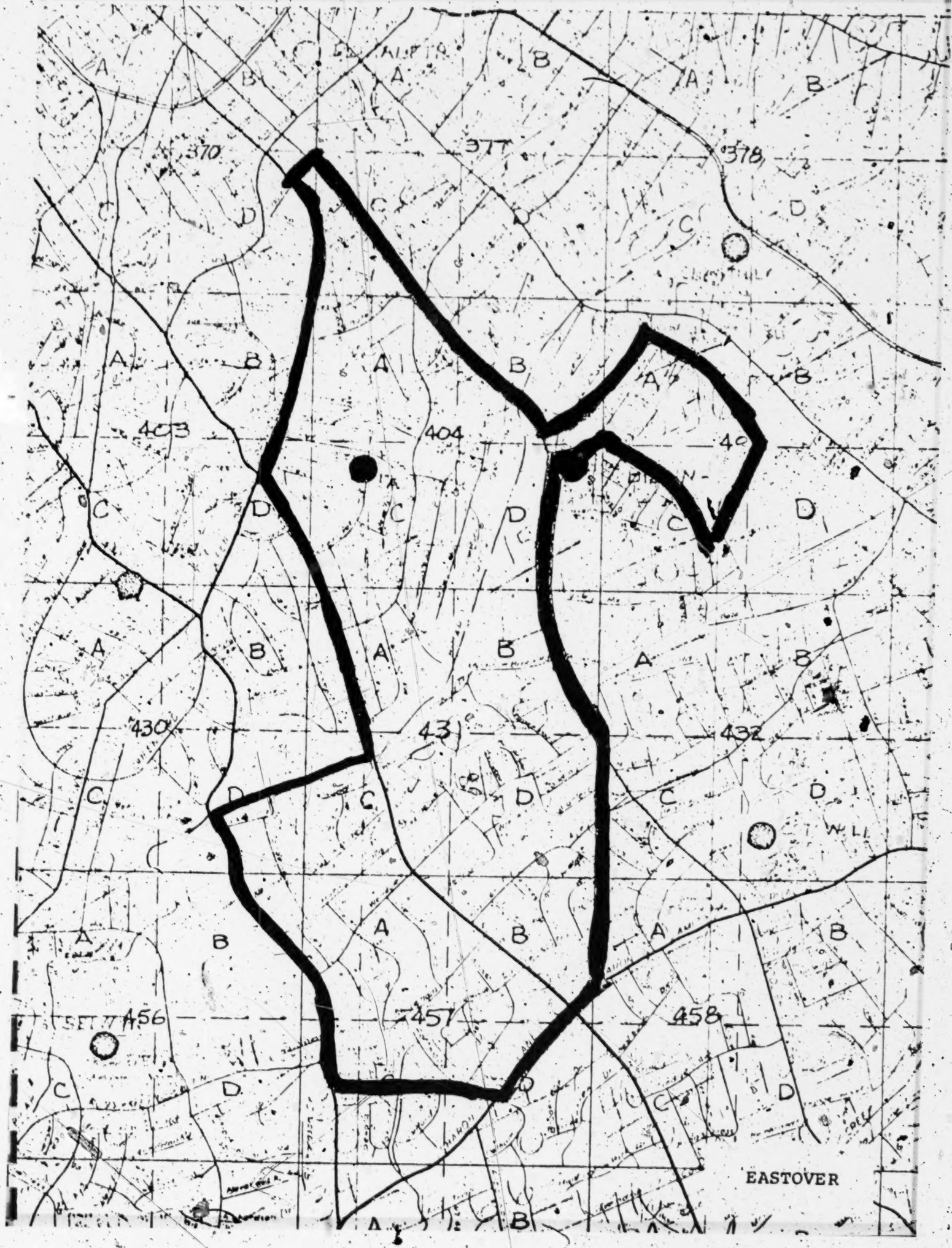
EASTOVER SCHOOL ATTENDANCE AREA

Beginning at Providence and Caswell. South on Providence, left at intersection of Queens Road and Providence to include both sides of Providence to 1700 block. Right at Briar Creek, follow creek to Sharon Road, bypassing Brandon Circle. South on Sharon to include left side of Sharon. Continue to 3300 block of Foxcroft. Cross country crossing 2200 block of Ferncliff to Sharon Lane at Pelham. North on Sharon Lane to Providence. Cross country to Ferncliff not to include 1400 block. Cross country to include 1500 block of Audubon and of Exeter. Cross 1200 block of Andover to Aylesford Road; on to include 1200 block of South Canterbury and 1100 and 1200 blocks of Coddington Place to Randolph at 1100 block of Coddington. Follow Randolph to a point west of Skyland Avenue. Go northeast to Skyland including Goldwyn Street. Continue southeast to end of Burkland Drive. Go north cross country to railroad at Dunn Street. Follow railroad to Heflin, go south east between Heflin Street and Skyland Avenue including all of Skyland back to Randolph Road. North on Randolph Road to Caswell, south on Caswell to Providence.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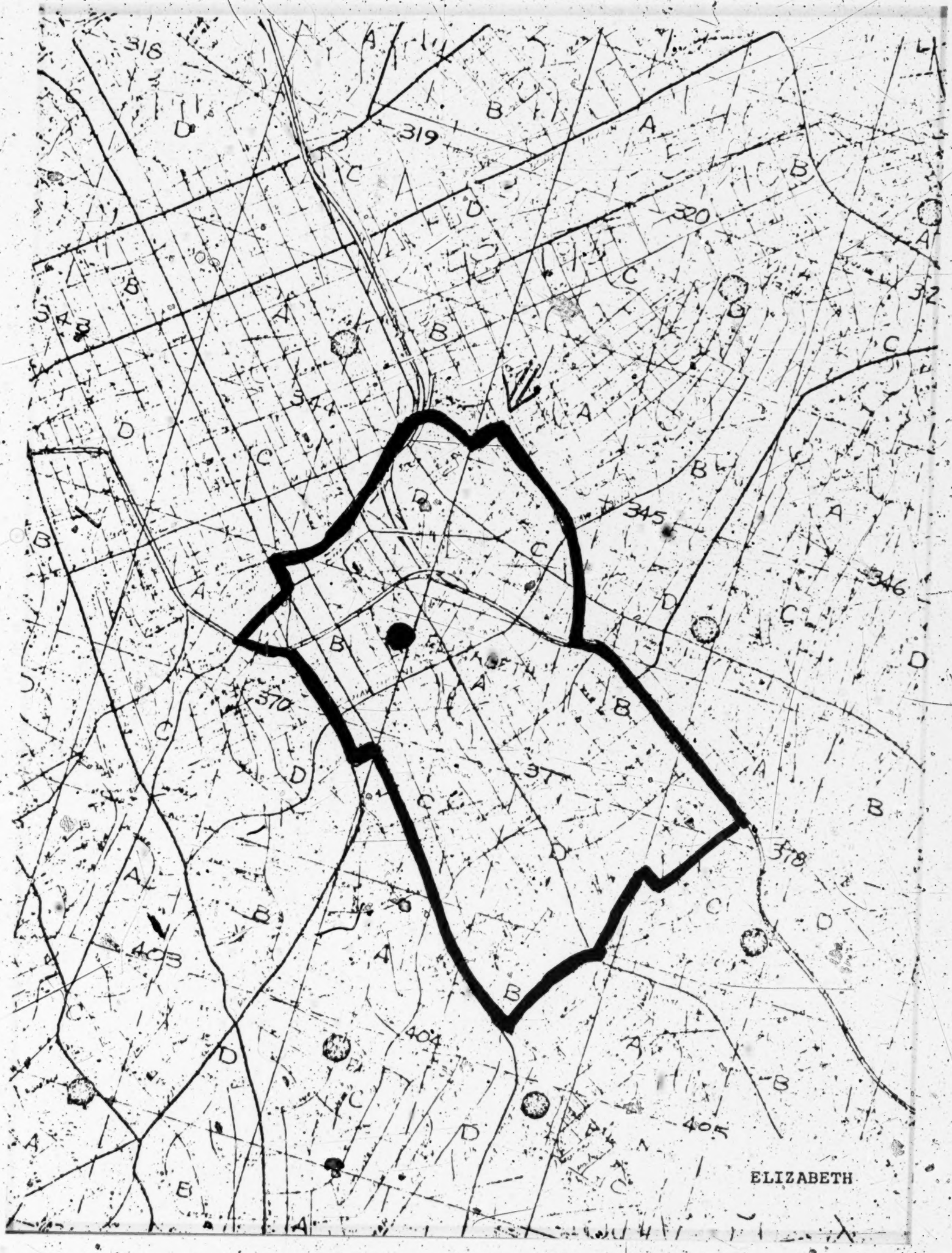
EASTOVER

ELIZABETH SCHOOL ATTENDANCE AREA

Beginning at Piedmont Courts, start from the intersection of Seigle Ave. and Seaboard railroad. Proceed east following the railroad, crossing Central Avenue, to the overhead bridge at Pecan Ave. and Independence Boulevard. Left on Independence and continue to Lorna Street. At Lorna Street make a right turn south and proceed to Kingsbury Drive. Right one block on Kingsbury Drive then left and proceed in a straight line to Fireman's Hall on E. 7th Street. At E. 7th Street near Fireman's Hall turn diagonally right, westward, and follow Briar Creek to Randolph at Sandlewood. From this intersection continue northwesterly along Randolph to Caswell Rd., then southwest to Providence Rd. Continue northwesterly along Providence to Independence. Turn left on Independence to Kings Drive, right on Kings Drive to E. Fourth St. Left on E. Fourth Street to Sugar Creek. With a right turn it follows the creed and crosses Elizabeth Ave., E. 7th St. and E. 10th St. After crossing E. 10th Street follow 12th Street a short distance to Willis Street. At Willis St. turn sharply right continue along Willis St. to 725 Seigle Avenue, left on Seigle Avenue to the railroad.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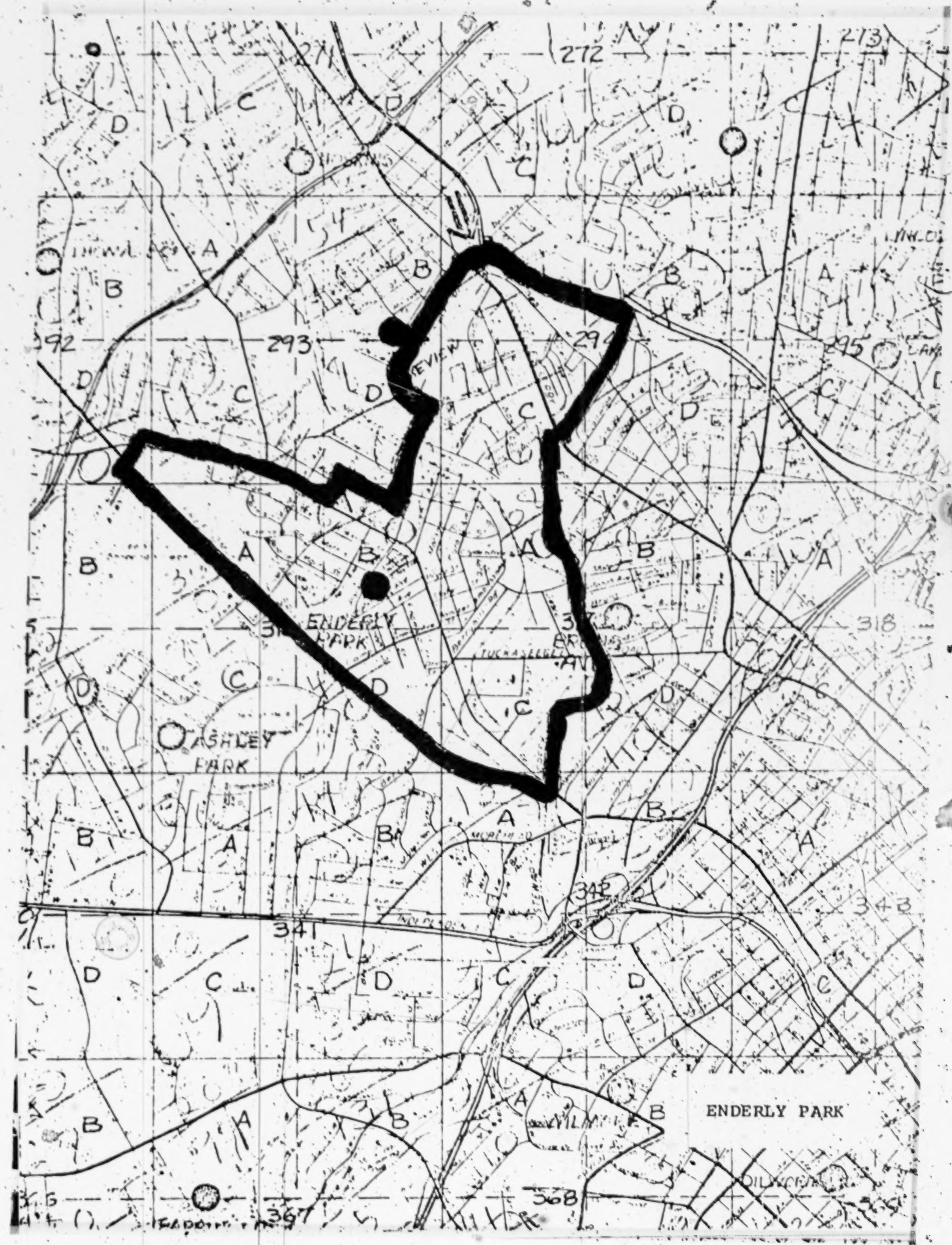
ELIZABETH

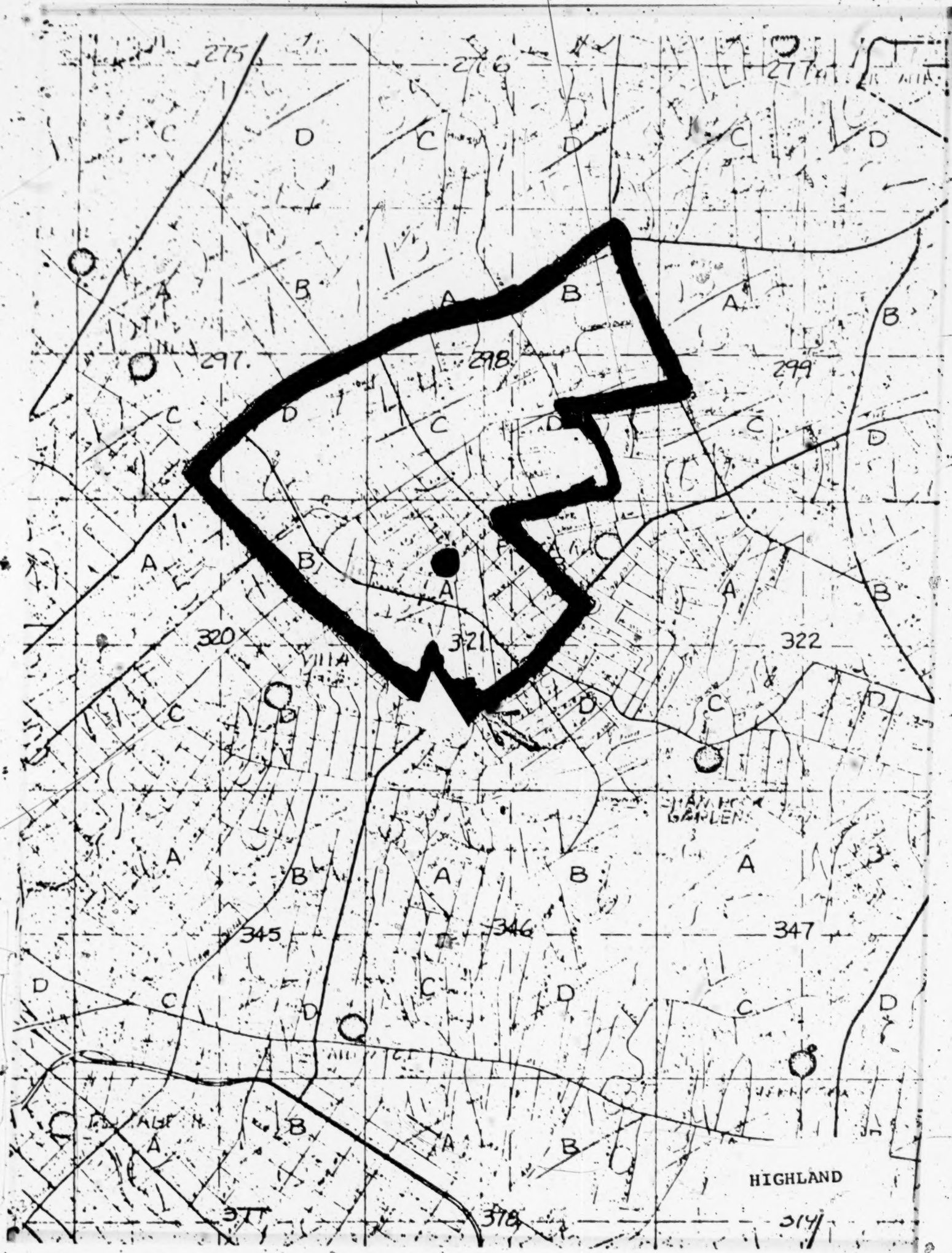
ENDERLY PARK SCHOOL ATTENDANCE AREA

Beginning at intersection of Norwood and Rozzell's Ferry Road to include left side of Norwood. Follow Norwood to Parkway. South on Parkway to include left side of Parkway. Right on Avalon Avenue at 3000 block of Parkway. West on Avalon to McQuay (right side goes to Lakeview and left side goes to Enderly Park). Left on McQuay proceed to Tuckaseegee Road. West on Tuckaseegee to Old Cannon Airport Road (left side of 3300 block goes to Enderly Park, and the remainder of Tuckaseegee goes to Lakeview--3400 to 4000 blocks). South on Old Cannon to Freedom Drive. East on Freedom to Stewart Creek. Follow creek north to Seaboard Railroad. West on railroad to intersection of Norwood and Rozzell's Ferry Road.


ENDERLY PARK
ASHLEY PARK
ENDERLY PARK

HIGHLAND SCHOOL ATTENDANCE AREA

Beginning at the intersection of The Plaza and Clemson Avenue, proceeding in a northerly direction to 36th Street. North on 36th Street to Spencer Street. Northeast on Spencer Street to Anderson Street. Follow Anderson Street to the railroad. East on railroad to Sugar Creek Road. North on Sugar Creek Road to North Tryon Street. Southwest on North Tryon Street to 28th Street. Cross country to northeast 28th Street. Southeast on 28th Street to Lunsford on to Duncan to Woodside. Southeast on Woodside to Clemson Avenue and The Plaza.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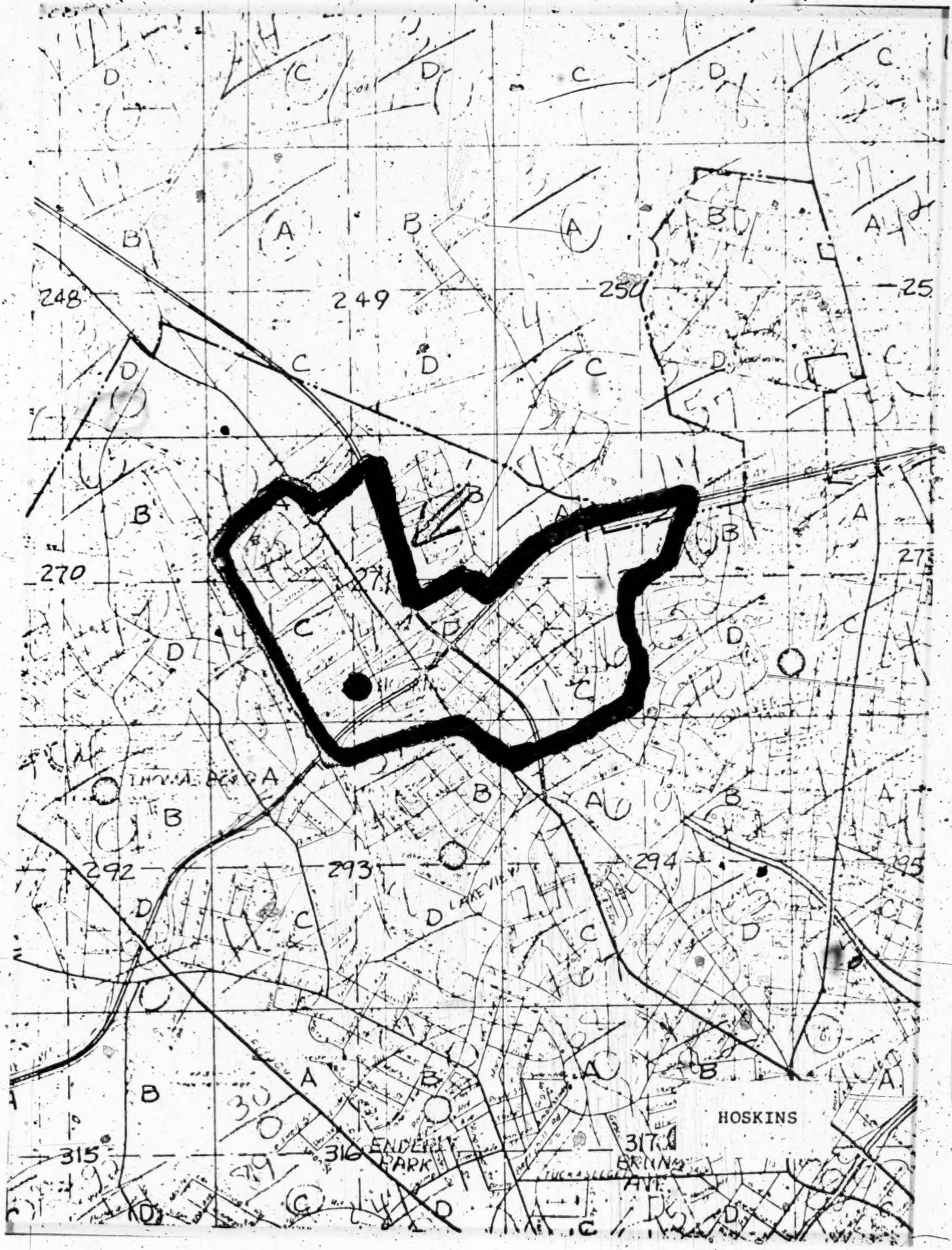
HIGHLAND

HOSKINS SCHOOL ATTENDANCE AREA

Beginning at the intersection of Highway 16 and Hoskins Road. Proceed northwest on Highway 16 to include 4400 block of Highway 16. Southwest on imaginary line crossing Rozzell's Ferry Road at end of 4400 block. Follow the railroad in southwesterly direction to include Brookfield section, Ridgeley Drive, Taluca Place and Anita Court to a point opposite the 4700 block of Morgan Street. South on railroad to I-85 including Dupree Street. East to include 3500 block of Rozzell's Ferry Road. East to intersection of Pennsylvania Avenue and Knox Street. Follow imaginary line to Stewart Creek. North on creek to I-85. South in center of I-85 to intersection of Tennessee to 300 block of Linwood. Southwest on Linwood to Belhaven Boulevard. West on Belhaven to Hoskins Road.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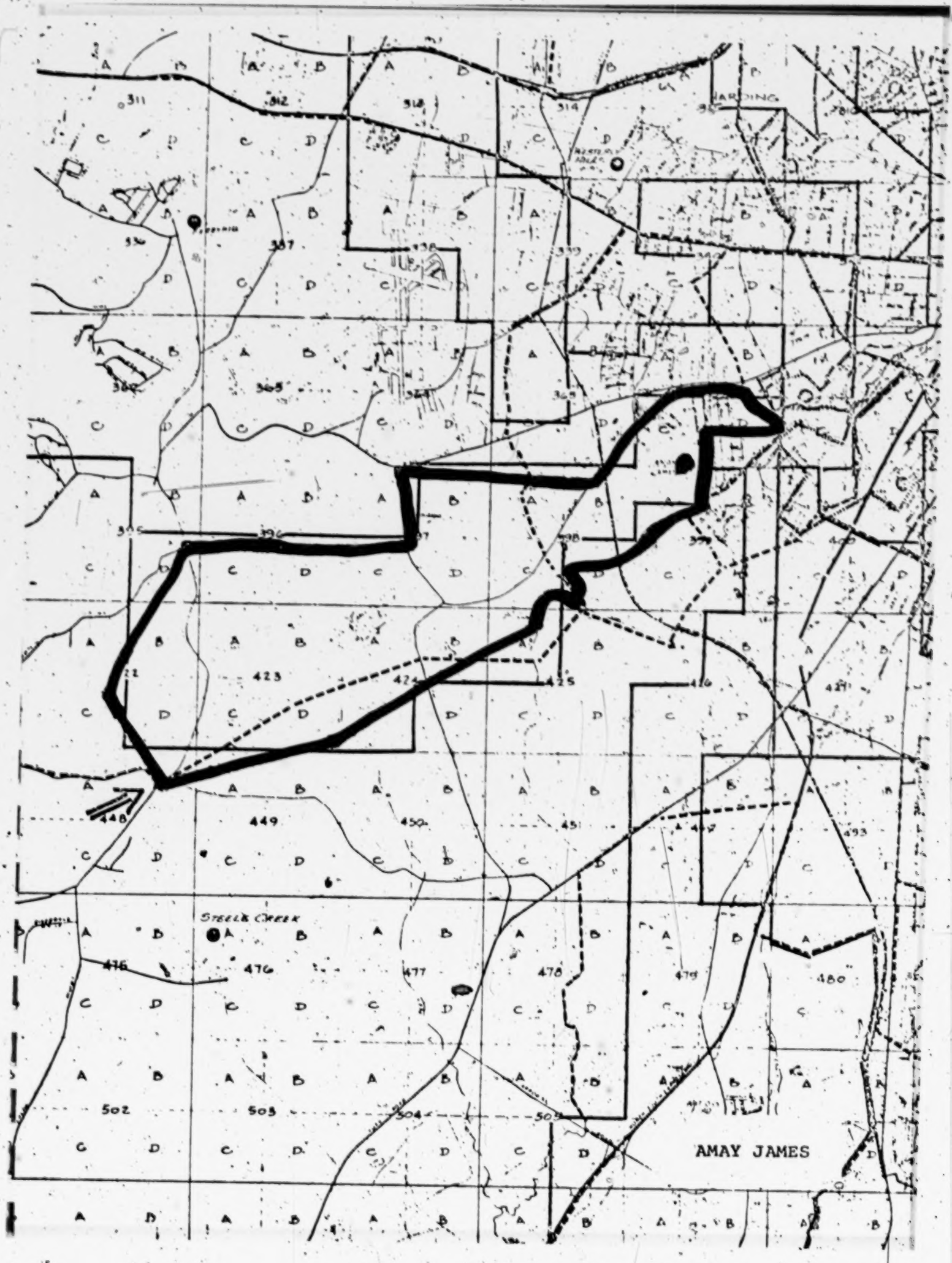
HOSKINS
ENDERLY PARK
BRINK AVE.
LAKEVIEW

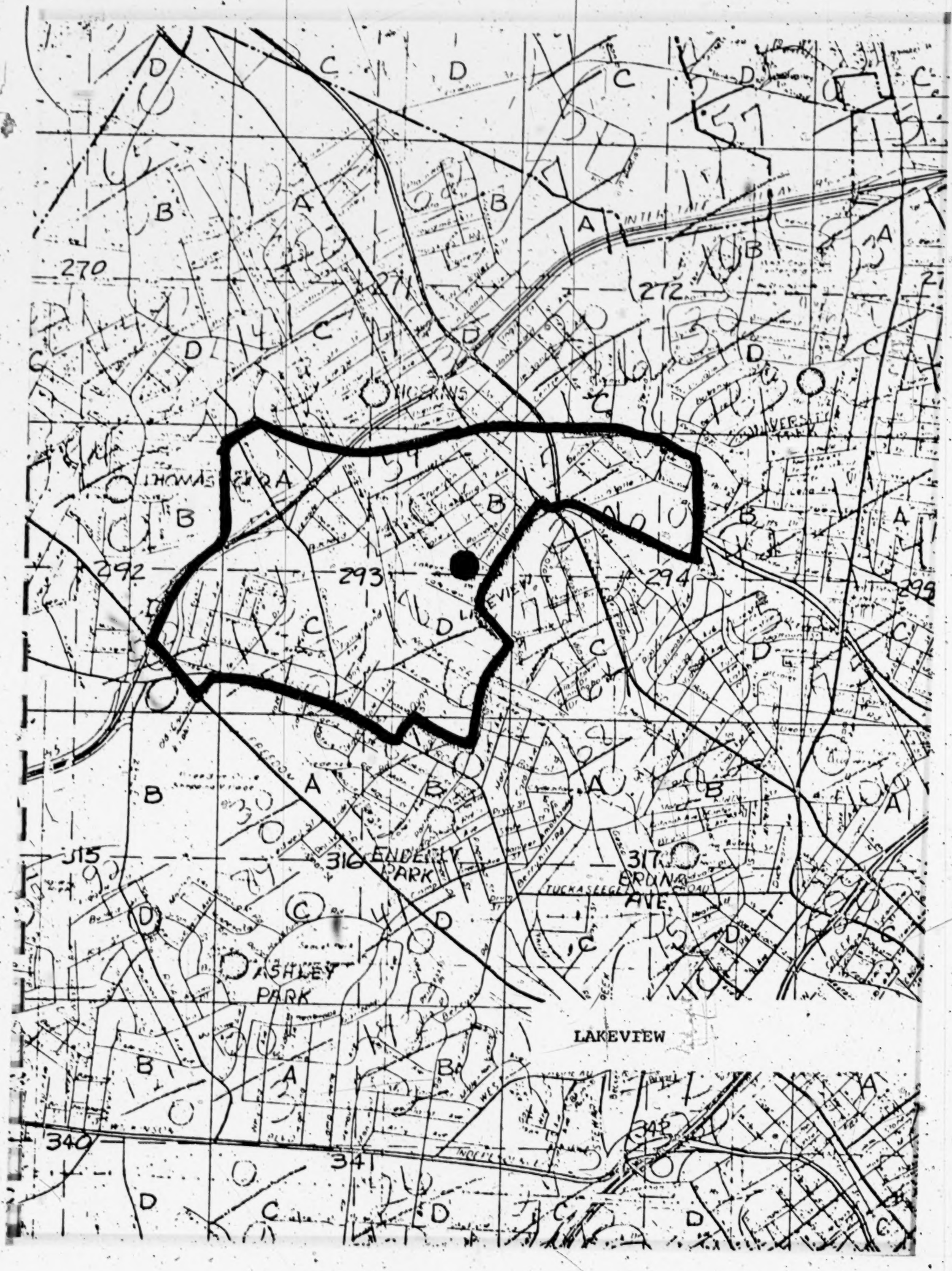
AMAY JAMES SCHOOL ATTENDANCE AREA

Beginning at intersection of Shopton Road and Highway 160, cross country to south end of Eagle Lake. Proceed cross country to Irwin Creek and Amay James Avenue. North on Amay James to intersection of Coronia Street. East on Coronia to a point on Irwin Creek to parallel intersection of Wickham Lane and Norwich. Include Wickham Lane. West on West Boulevard excluding all on West Boulevard. To Wilmont Road. Southwest on Wilmont excluding all on Wilmont to 3212. West cross country to intersection of New Dixie and Wilmont Roads. South on Wilmont to Cessna. West cross country to intersection of Dixie Road and Garrison. Southwesterly, cross country to Markwood Road. South to Shopton and Highway 160.


STEELE CREEK
AMAY JAMES

LAKEVIEW SCHOOL ATTENDANCE AREA

Beginning at Stewart Creek and La Salle Street on the northeast, running south along creek to S.A.L. railroad tract then northwest to 3200 block of LaSalle Street, crossing Belhaven Boulevard to the intersection of West Trade Street and Rozzells Ferry Road to the 100 block of Norwood Dr., southwest to the 3200 block of Parkwood Avenue. South to 3000 block of Avalon Avenue and westerly to the 1100 block of McQuay Street, then south to 3200 block of Tuckaseegee Road, intersecting the 1100 block of Karendale Avenue. Northwest on Tuckaseegee to Old Cannon Airport Road. South on Old Cannon to Freedom Drive. Turning directly northwest on Freedom Drive and I-85 going northeast to intersection of East End Street and the 600 block of Key Street. East on Rowan Street to Glenwood, then to the 4200 block of Tillman Road. South, bypassing Reeves Court and Blenhiem Road, 4100 block down of Welling Avenue, then North crossing I-85 to the 100 block of Halsey and Odum crossing the Seaboard Railroad and Belhaven Blvd. to the 400 block of Pennsylvania Avenue. East to Stewart Creek at LaSalle Street.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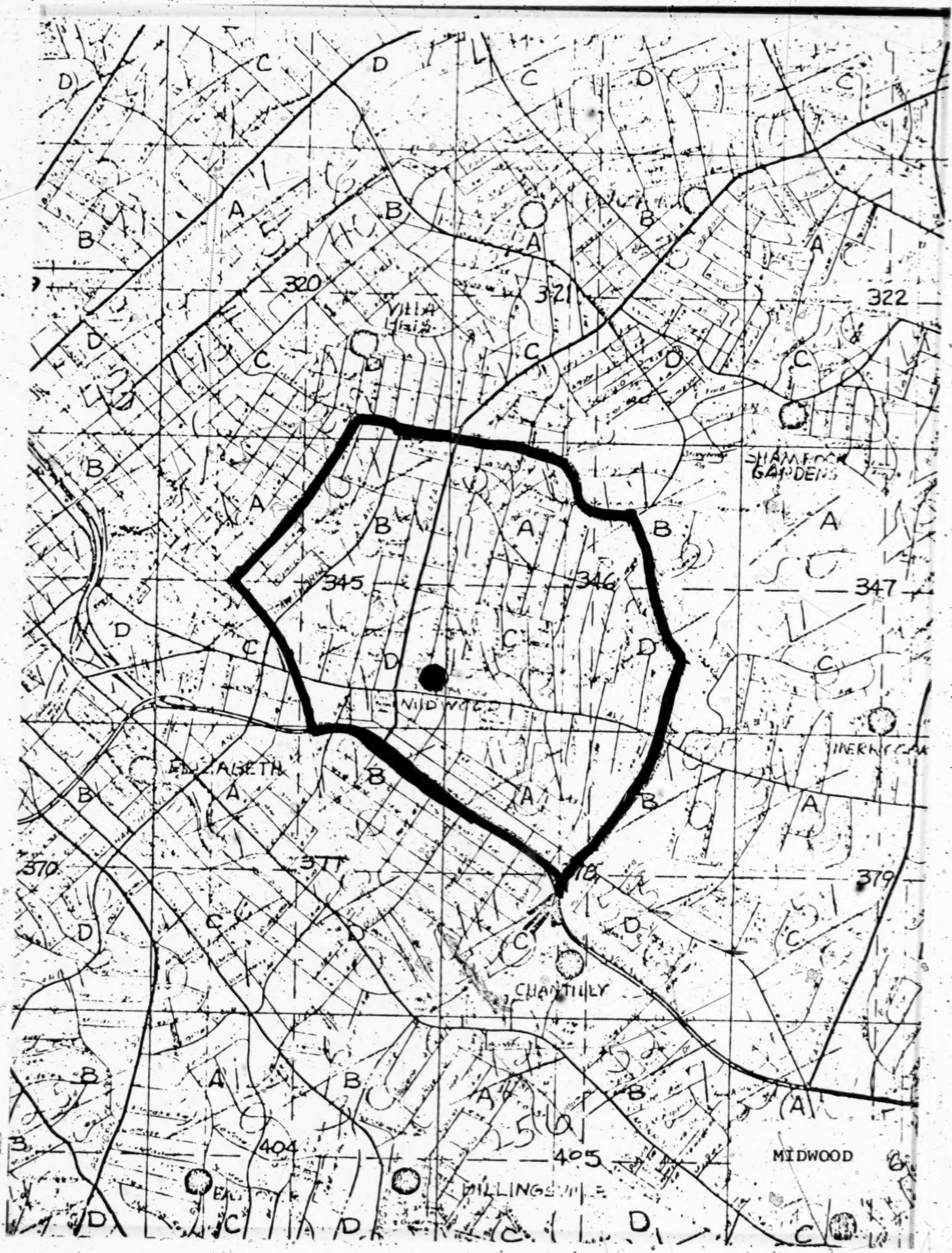
ENDEL
PARK
ASHLEY
PARK
LAKEVIEW
BRUNS
AVE.
TUCKASEEGEE
ROAD

MIDWOOD SCHOOL ATTENDANCE AREA

Beginning at Independence Boulevard and Briar Creek, follow Briar Creek in a northeasterly direction to Peppercorn Lane. North, bypassing Peppercorn to Mecklenburg Avenue. Northwest on Mecklenburg Ave. (even numbers in the 1700-2200 blocks) to The Plaza. Northwest cross country to Parkwood (even numbers in the 1200 and 1300 blocks) to Hawthorne Lane to Pegram Street. South on Pegram (even numbers in the 1000 - 1700 blocks to railroad. Follow railroad south to Independence Boulevard. Southeast on Independence (odd numbers 1200 - 2100 blocks) on Independence to Briar Creek.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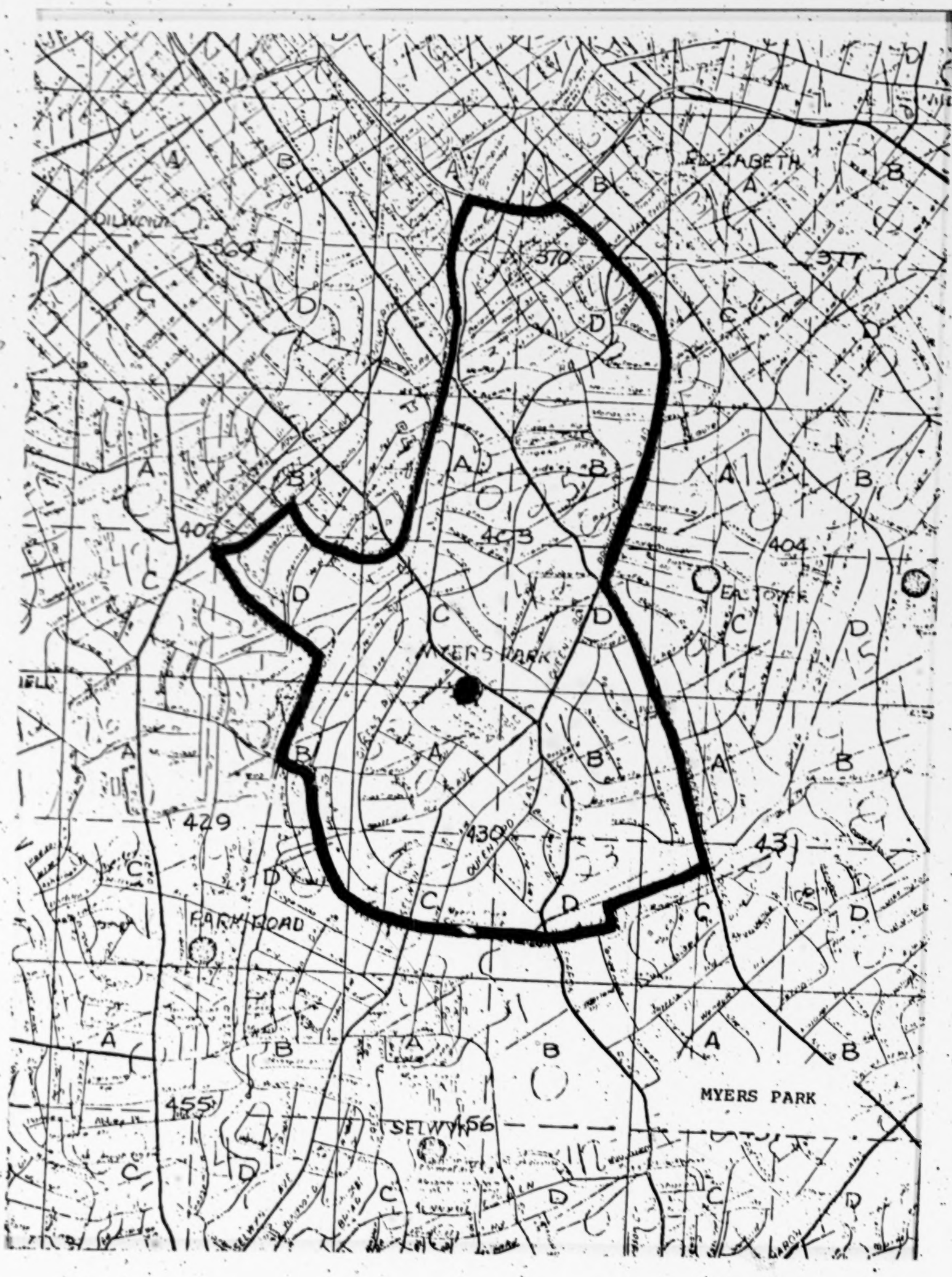
VILLA
HAIS
NIDWC
CHANTILLY
MIDWOOD
BILLINGSLEY

MYERS PARK SCHOOL ATTENDANCE AREA

Beginning at the N. W. corner of the area at the intersection of Independence Boulevard and Sugar Creek. Follow Sugar Creek south to Brunswick Avenue. Turn right to Blythe Boulevard and continue south on Blythe until you come to Lombardy Circle. Continue on Lombardy Circle to corner of New Hope Road. At this point, follow small creek westward to corner of Lynway and Cumberland Avenue. Continue on Lynway to Floral Ave. Turn left on Floral Avenue to Clayton Drive. At Clayton Drive, cross country westward to the intersection of Kenilworth and Scott Avenue. At this point, follow the creek southeast through Freedom Park until the creek intersects Princeton Avenue. At this point, follow Princeton eastward to Sterling Road. Turn right on Sterling to Selwyn. Cross country eastward to Brandon Circle, which includes the 2300 block of Sharon. Continue on Brandon Circle until it reaches Briar Creek. Follow Briar Creek northeastward to Providence Road. At this point, turn left on Providence Road and move northwestward until Providence Road joins Third Street. Continue on Third Street to Independence Boulevard. Turn left on the Boulevard and go to the intersection of Sugar Creek and Independence Boulevard. This marks the beginning point.


ELIZABETH
MYERS PARK
EASTOVER
FARM ROAD
SELWYN
MYERS PARK
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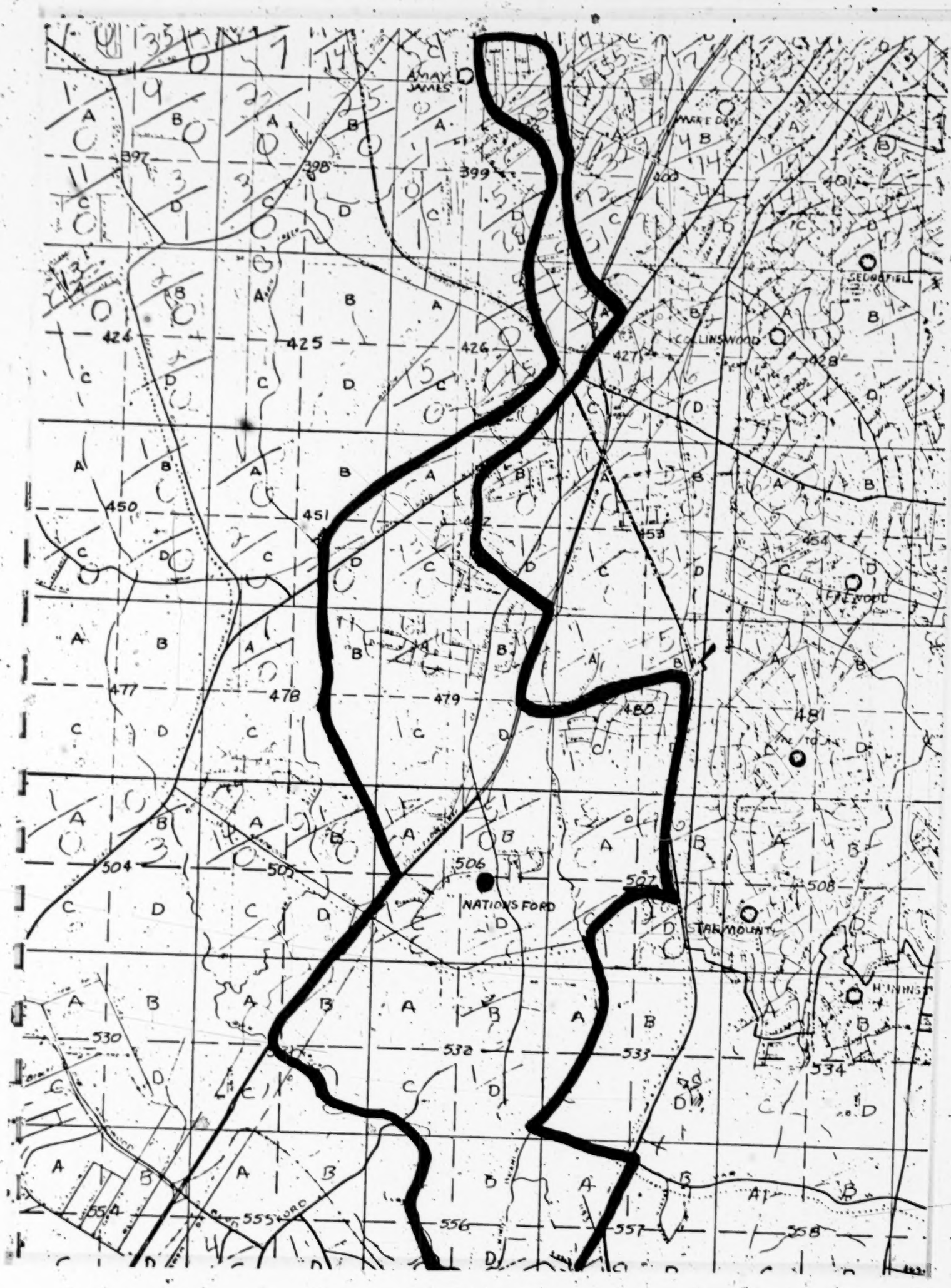
Nations Ford Attendance Area

Beginning at a point at Ebenezer Church, cross country west between Montclair South Development and Kenley Lane. Continue to I-77. North on I-77 to Sleepy Hollow Road exit. West on Sleepy Hollow Road to Nations Ford Road. Cross country northwest between Sleepy Hollow Road and Will Brown Circle to intersection of Queen Anne Road and Southhampton. North on Southhampton to Highway 49. Northeast on Highway 49 to Jeremiah Street. Northwest on Jeremiah to end of street including Jeremiah. Cross country to 1100 block of Rollingwood, including Lynette Court. Continue cross country in northeasterly direction to Hiram Street to Caronia Street. West on Caronia to Amay James Avenue. Northeast on Amay James to Irwin Creek. South cross country by Broadview Drive to end of Yorkwood. Continue cross country southwest to Clear Water Drive. Continue cross country to Irwin Creek. Follow Irwin Creek south to a point below Springfield Development. Southeast cross country, crossing Choyce Avenue at northern end of Sheryle Circle and continue to I-77. Southwest on I-77 to Irwin Creek. Follow Irwin Creek east to Sugar Creek. Follow Sugar Creek to intersection of Kings Branch. East cross country to Pineville Child Development Center. North of Old Pineville Road to railroad crossing. Follow railroad north to Sharon Road. West cross country to Kings Branch. North following Kings Branch to Arrowood Road. West on Arrowood to Old Pineville Road. North on Old Pineville Road to Ebenezer Church.


AMAY
JAMES
MARE DEVE
SELDENFIELD
COLLINSWOOD
FIVEFORK
NATIONS FORD
STAR MOUNT
HUNNICUTT
LORD
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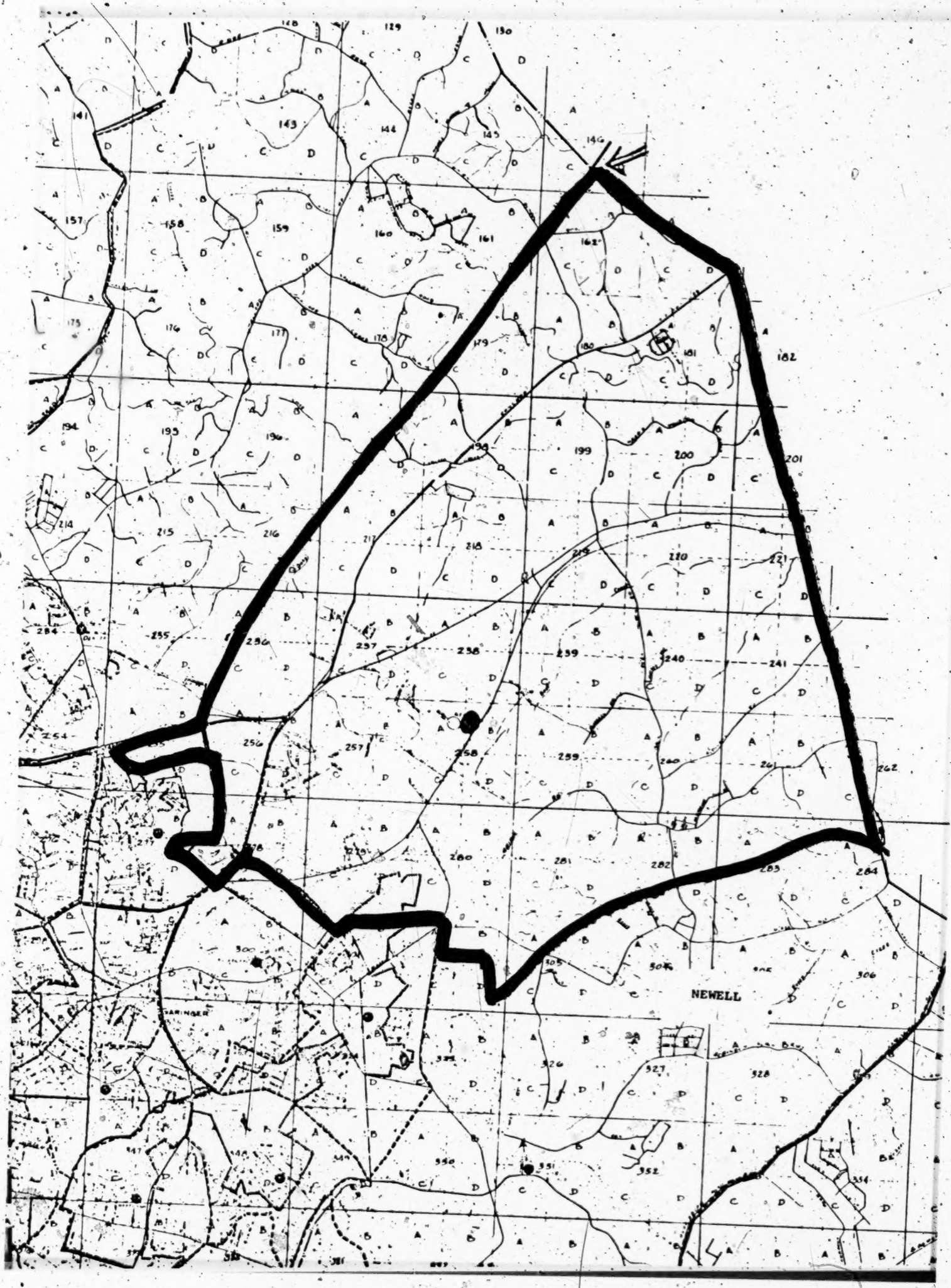
NEWELL SCHOOL ATTENDANCE AREA

Beginning at the Cabarrus County Line and I-85 and proceeding along I-85 south to Tom Hunter Road. East along Tom Hunter Road to Monteith Drive. South on Monteith Drive, including sides of Monteith Drive, to the Cha[illegible] Limits. Southeast along the city limit line to North Tryon [illegible]. North on North Tryon Street to Orr Road, [illegible]long Or[illegible] Concord Road at which point it follows a stre[illegible] to Cove Creek Road to Harrington Drive. Proceed between Cove Creek Road and Sommersworth to Ro[illegible] 2850. Along 2850 to Hickory Grove Road. South on Hickory Grove Road to a point midway between the Plaza Road Extension and Delta Lake Drive. Cross country taking in James Road and runs northeast cross country between Rocky River Road and Plaza R[illegible] Extension to the Cabarrus County Line.


NEWELL

OAKDALE SCHOOL ATTENDANCE AREA

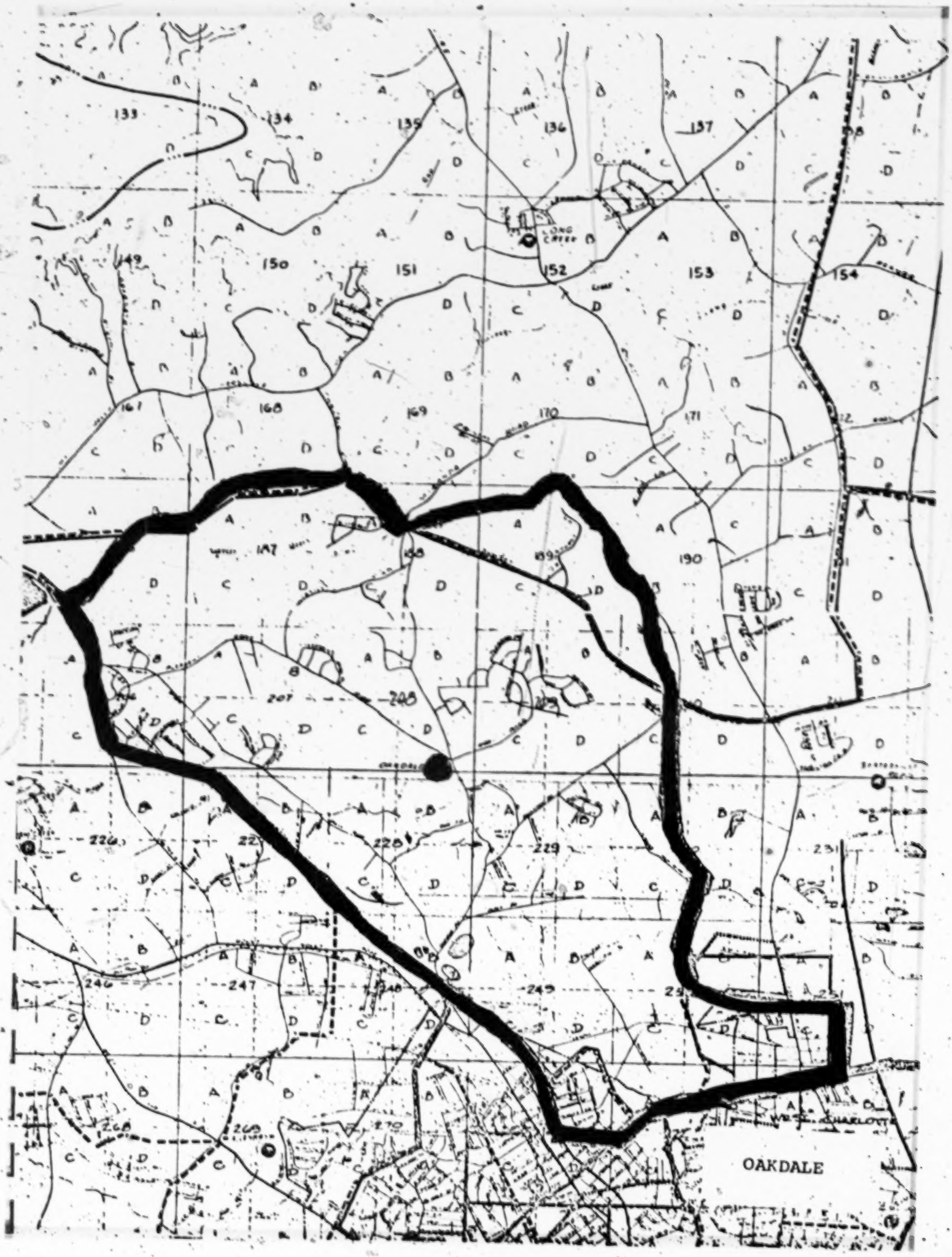
Beginning at the intersection of Long Creek and Rozzells Ferry Road, follow the left side of the road to McClure Circle. Continue from McClure Circle down Rozzells Ferry Road to Belhaven Boulevard using the road as the boundary line. Follow from 8100 Belhaven Boulevard to 4100 Belhaven Blvd. using the boulevard as the boundary line.

Turn left at 4100 Belhaven Boulevard straight to the intersection of North Creigler Street and Kentucky Avenue. Travel east on Kentucky Avenue to Linwood Avenue. Continue straight across Linwood Avenue and Sage Avenue to I-85.

Follow the left side of I-85 to the east end of Wilson Avenue; turn left and continue straight to the 3300 area of Northbrook Drive. Turn left and follow Northbrook Drive to 1400 Plumstead.

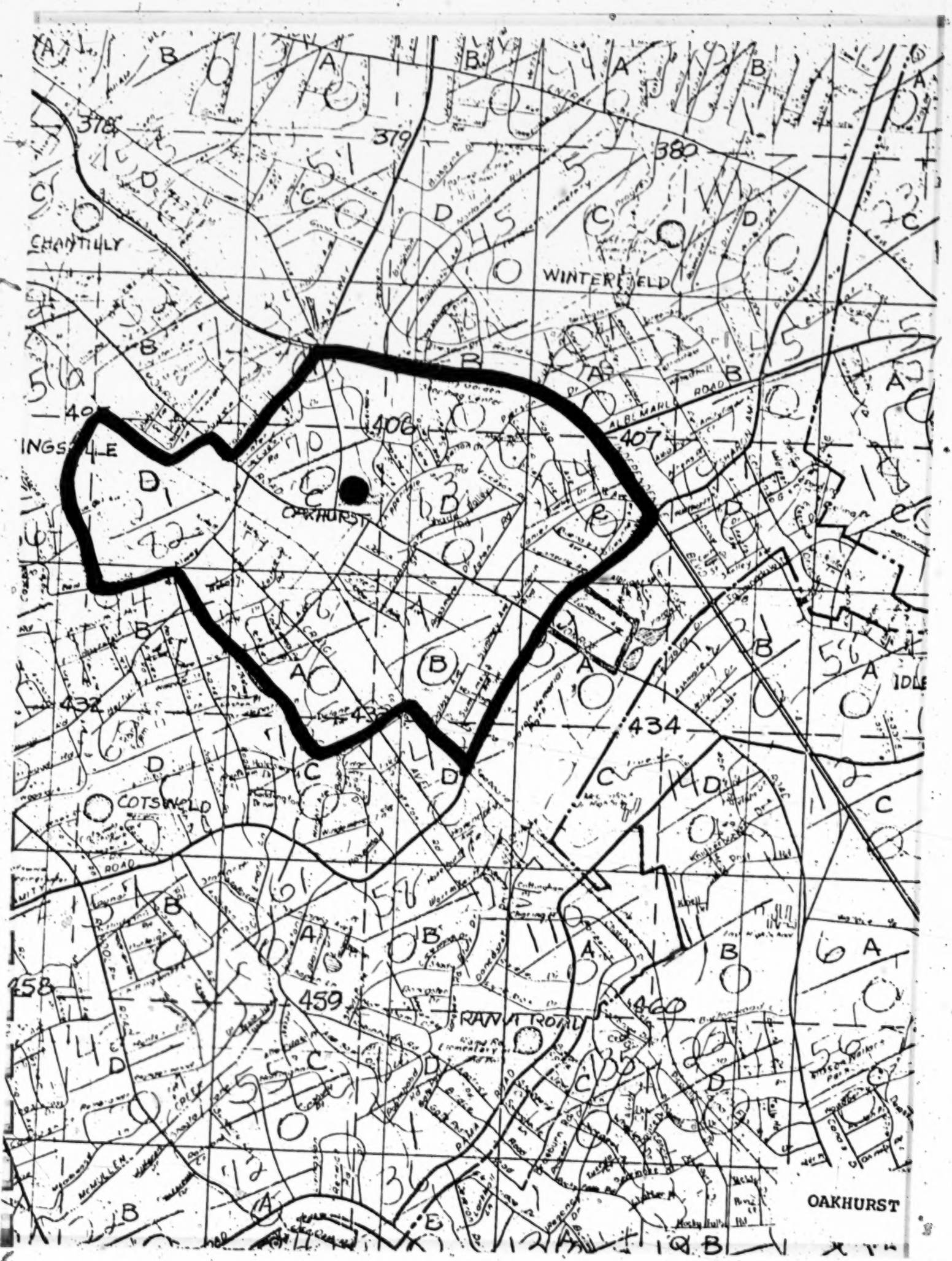
Turn right at 1400 Plumstead and follow Stewart Creek to the north side of Capps Hill Mine Road and then proceed straight to the north side of Sunset Road and Peachtree Road Intersection.

Follow Trinity Creek north of Sunset Road and Kinghurst Drive to Oakdale Road. Turn right and follow the left side of Oakdale Road to Long Creek. Turn left at the intersection of Long Creek and Oakdale Road and follow Long Creek to Rozzells Ferry Road, using the creek as the boundary line.


OAKDALE

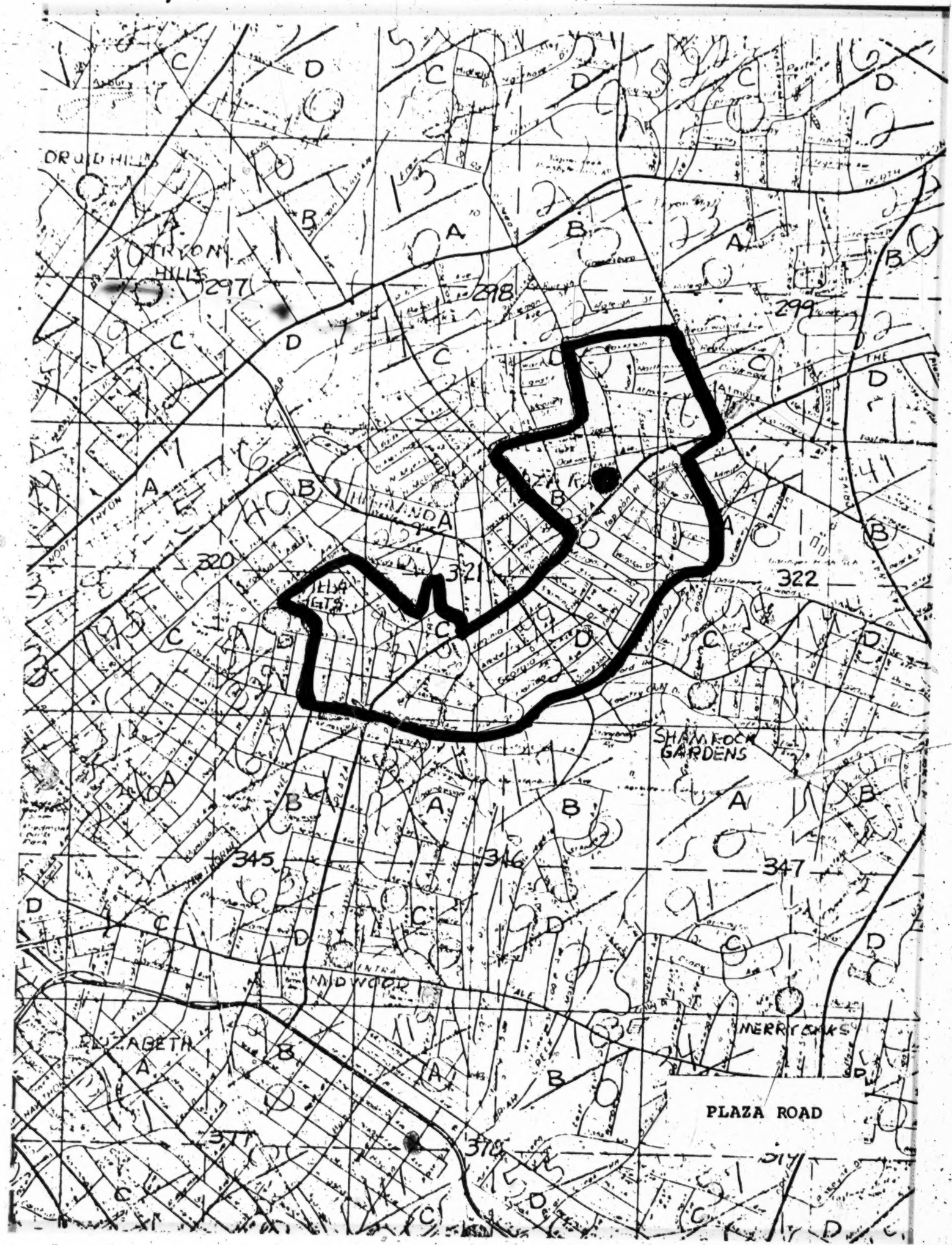
OAKHURST SCHOOL ATTENDANCE AREA

Beginning at the intersection of Commonwealth Avenue and Independence Boulevard proceed east on Independence to intersection of Independence and Sharon Amity Road. South on Sharon Amity including Lantana Avenue to dead end of street. Cross Monroe Road, from Monroe Road back to Sharon Amity. Continue south on Sharon Amity to railroad, follow railroad up above Lomax Avenue and across to DeLane Avenue. From this point follow McMullen Creek to 900 McAlway Road, west along Beal Street to the 3600 block of Marvin Road, excluding Beal and Marvin Road, including the 3600, 3500, and 3400 blocks of Marvin Road and Villa Court. Line continues north to railroad tracks, south on railroad tracks, across to the 3900 block Monroe Road. Down Brookhurst Drive including both sides to intersection of Commonwealth and Independence Boulevard.


CHANTILLY
WINTERFIELD
ALBEMARLE ROAD
OAKHURST
COTSWOLD
RANNTROAD
OAKHURST

PLAZA ROAD SCHOOL ATTENDANCE AREA

Beginning at Mecklenburg Avenue and The Plaza proceed east on Mecklenburg (odd numbers to Plaza Road) to Fort Street. Follow Fort Street to East Ford. Continue above East Ford to intersection of Matheson and East Ford. Continue on north side of East Ford to Shamrock. From Shamrock cross country through 1600 blocks of Herrin, Academy, Anderson and east of Jensen to north of McMillan. East to Sugar Creek Road. North on Sugar Creek Road to railroad. West on railroad to 700 block of Anderson. Southwest on Anderson to Spencer and to 800 block of Herrin, including all of Spencer. West to 36th Street. South on 36th Street to The Plaza. West on The Plaza to Clemson Street (odd numbers to Highland and even numbers to Plaza Road). Right on Clemson, one block. Turn left on Woodside and continue to Duncan. Turn left and follow Duncan one block to Lunsford. Turn right on Lunsford to Pickney. Left to Everett Place. Turn left on Everett Place to Parsons. Turn right to Parkwood and go down Parkwood to Mecklenburg.


DRUID HILL
TYRON HILL
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SHAMROCK GARDENS
MERRIMACK
PLAZA ROAD
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SEDGEFIELD SCHOOL ATTENDANCE AREA

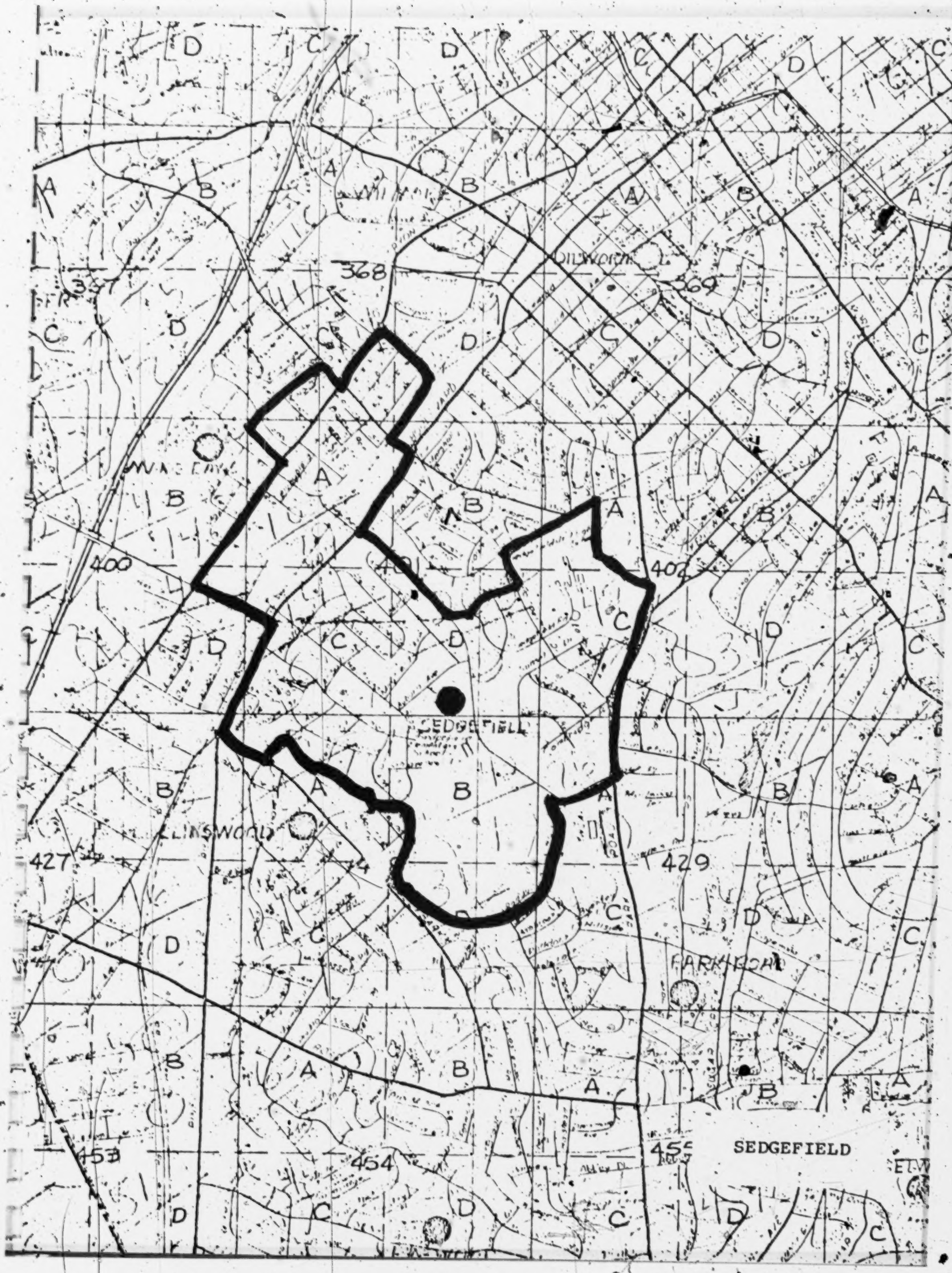
Beginning at the intersection of Marsh Road, proceed north up the center of Park Road to the 2500 block of Park Road. Left up McDonald Ave. to intersection of the 500 block of Pindexter Drive and Elmhurst Road. East on Pindexter to Dorchester Place, down Dorchester to Sedgefield Road. Sedgefield Road to Marsh and west on Marsh Road to South Boulevard.

North on South Boulevard to Remount Road. West on Remount to Dunavant and Dunavant to South Tryon. Follow South Tryon south to Remount Road. West on Remount to Baltimore Avenue. Proceed on Baltimore, including both sides of Baltimore, to a point just behind the intersection of Baltimore and Griffith but not including Griffith, thence to South Tryon. South on South Tryon to Clanton Road. East to South Boulevard. South on South Blvd. to Scaleybark.

The section from the 200 block of the left side (odd numbers) of Scaleybark Road through the 600 block and stretching back to the 600 block of Hartford is known as Colonial Village. All streets included in this section belong in the Sedgefield School district except: 3600 and 3700 blocks of Moultrie, 300 and 400 blocks of Webster, 3700 (no houses in this block) and 3800 block of Moultrie, 3700 and 3800 blocks of Anulin, 500 and 600 (all) blocks of Reynolds, 1000, 1100, and 1200 blocks of Hartford.

At the 800 block of Scaleybark we skirt the outer perimeter of Selwyn Farm (undeveloped property), to Little Hope Road follow Little Hope Road to Marsh. Right on Marsh to 3200 block of Park Road.

Note: District includes both sides of all streets except Park Road.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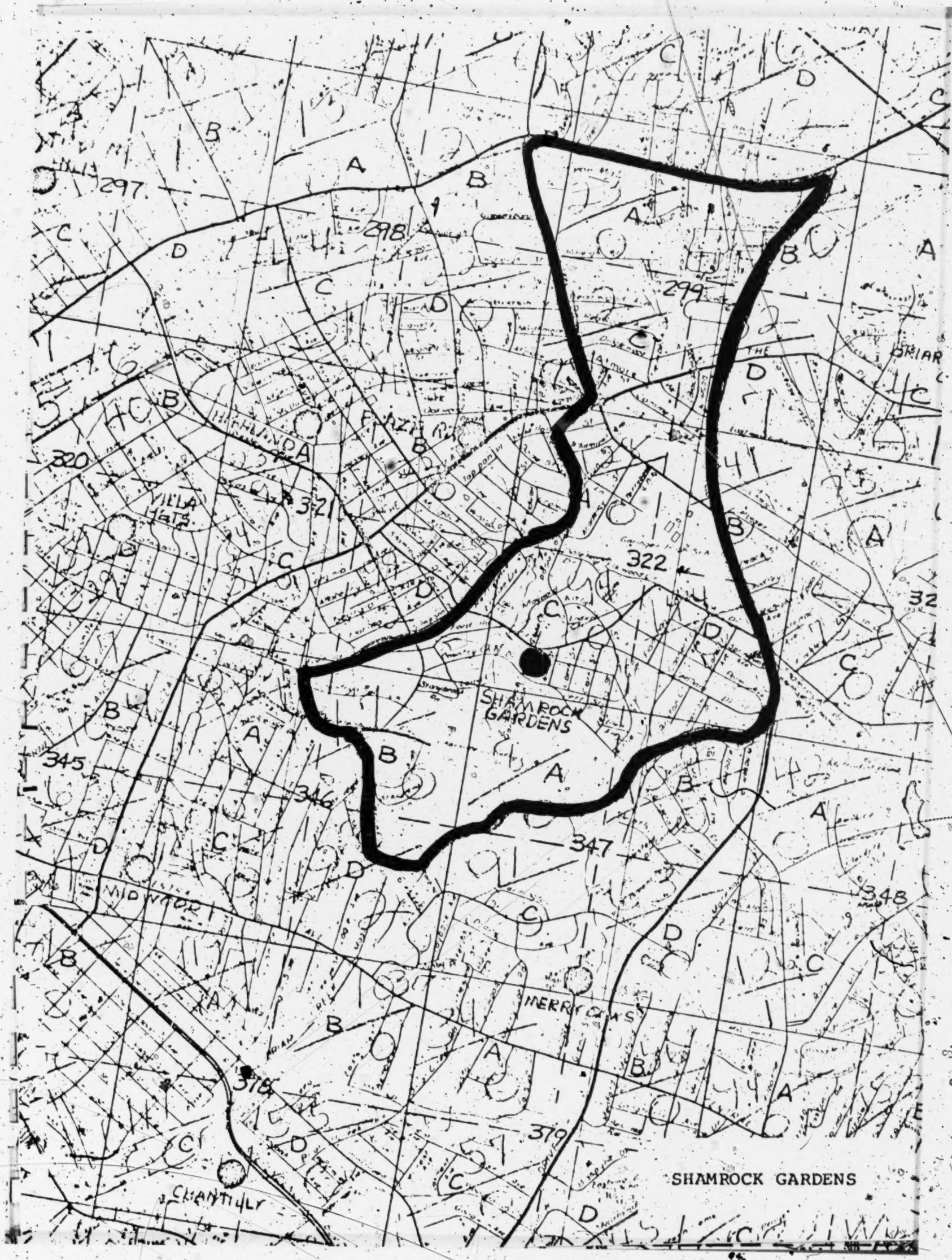
SEDGEFIELD
SEDGEFIELD
SEDGEFIELD

SHAMROCK GARDENS SCHOOL ATTENDANCE AREA

Beginning at The Plaza and Sugar Creek Road, cross country southwest to west side of Meadow Lane. South on Meadow Lane to Anderson. South on Anderson to Eastwood. South on Eastwood to Academy. Cross country to the 1700 block of Herrin. South on Herrin to East Ford Road. East Ford to Matheson. Cross country south of Fort Street to Mecklenburg Avenue. East on Mecklenburg Avenue to Peppercorn Lane. South on Peppercorn to end of street. Cross country to Briar Creek. Follow Briar Creek north to Eastway. North on Eastway to Tryon. West on Tryon to Sugar Creek Road. South on Sugar Creek to The Plaza.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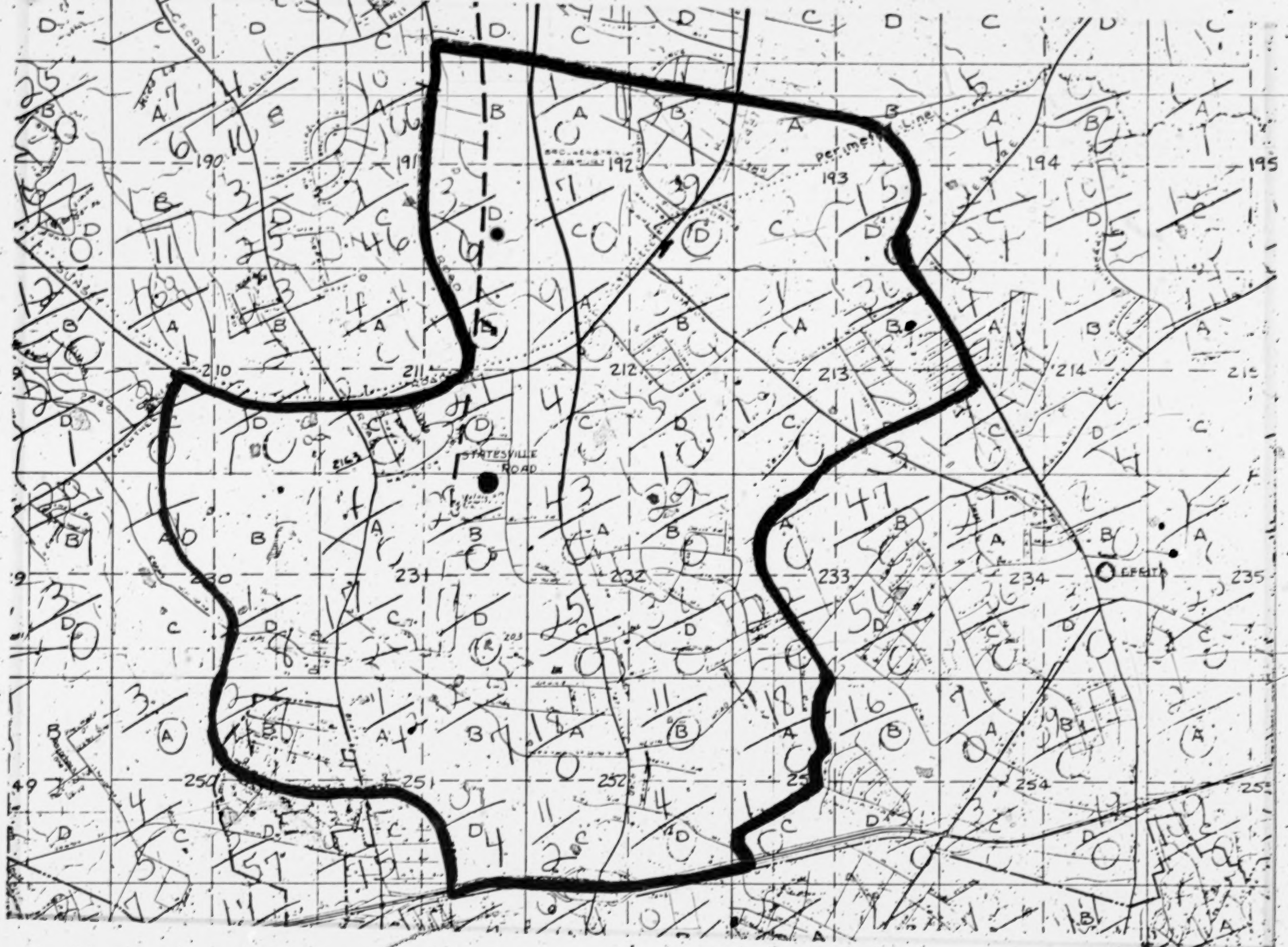
SHAMROCK GARDENS
SHAMROCK GARDENS
MERRY OAKS
CHANTILLY
VILLA HTS.
BRIAR

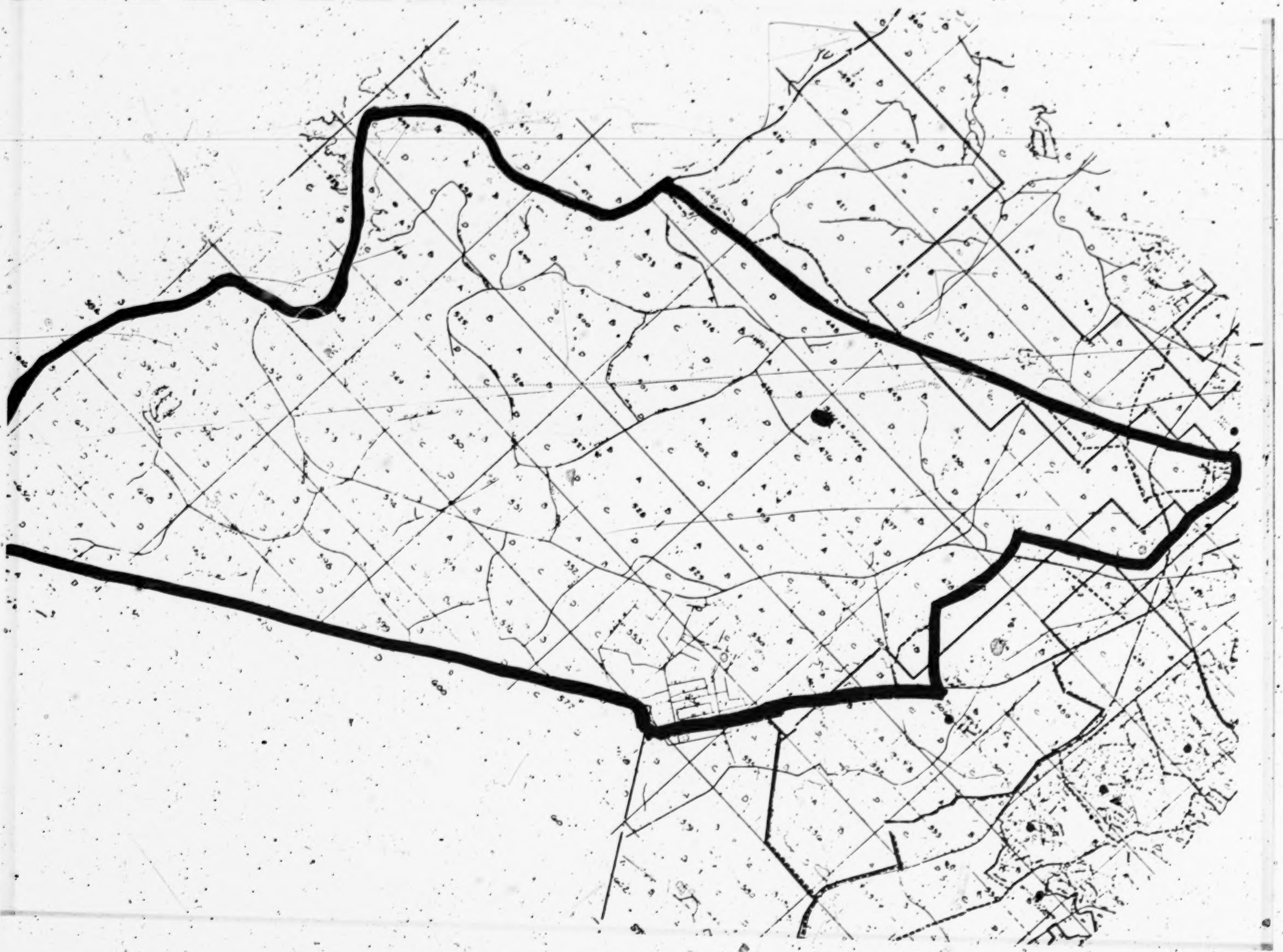
STATESVILLE ROAD SCHOOL ATTENDANCE AREA

Beginning at 3300 Beatties Ford Road. West on Northbrook Drive to Stewart Creek. Following Stewart Creek North to the corner of Peachtree and Sunset. East on the center Sunset to Reames Road. Follow east side of Reames Road. North to a point south of Hickory Lane. Proceed east to the west side of Potter Road. West side of Potter Road to Derita Road. In center of Derita Road South to 7000 block. East to the creek. Follow creek to the East, Starita Road. Southwest along I-85 to East of Avenues: Wilson, "A", "B", and "C". North to 3300 block and west to Beatties Ford Road.


STATESVILLE ROAD
Perimeter Line
EFFIE

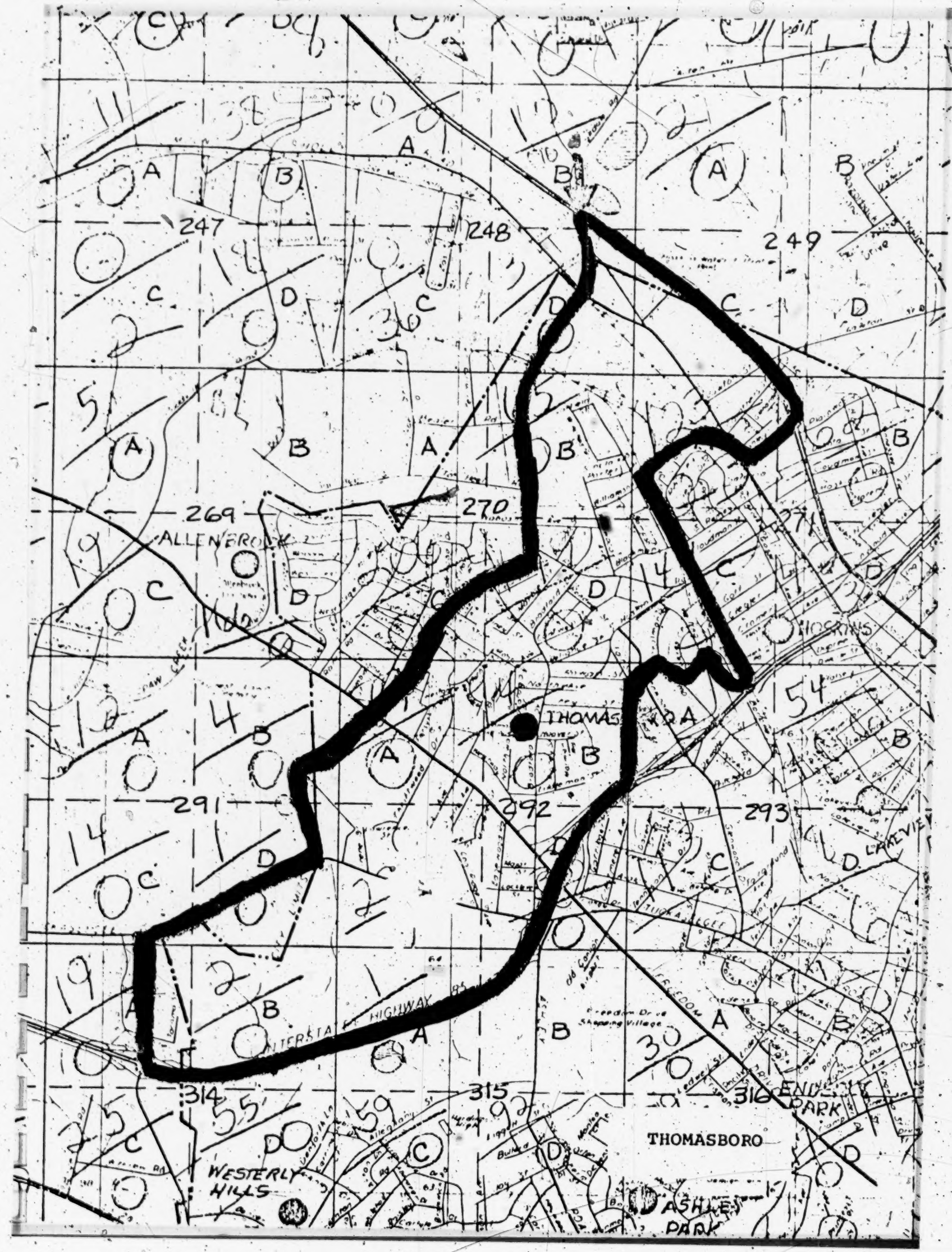
STEELE CREEK SCHOOL ATTENDANCE AREA

Beginning at I-77 and South Carolina line north to rear of Colony Acres Development. Northwest cross country - crossing Choyce Avenue at the northeastern intersection of Sheryl Circle and Choyce Avenue. Northwest to Irwin Creek. Follow Irwin Creek to center of York Road Landfill. Northeast to Yorkmont Road at rear of Potts Hardware Store. North to intersection of Pressley Road and Barringer Drive. North to the eastern end of Crestridge. Northwest to intersection of Fieldcrest and Rollingwood. West to Irwin Creek following Irwin Creek to end of Abiline Road. Southwest crossing Beam Road to intersection of Highway 160 and Shopton Road. Cross country west to Brown's Cove or county line. Follow county to South Carolina line.



THOMASBORO SCHOOL ATTENDANCE AREA

Beginning at the intersection of Belhaven Boulevard and Hovis Road to intersection of Interurban Avenue. The line extends south across Freedom Drive to a point where Weststone enters Freedom. Continue southward to city limits and along Tuckaseegee Road to center of Mulberry Church Road. South on Mulberry Church Road to I-85. East on I-85 to East End Street. North on East End Street to Rowan. East across Greenwood Drive to Tillman Road. East to railroad. North on railroad to Williamson. East to Rozzell's Ferry Road. South on Rozzell's Ferry to Manley. North including Manley to Belhaven Boulevard. North Belhaven to Hovis Road.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ALLENDALE
THOMAS
INTERSTATE HIGHWAY 95
WESTERLY HILLS
THOMASBORO
ASHLEY PARK
LAKEVIEW
ENVILLE PARK
Freedom Drive Shopping Village
Old Georgetown
Thomas Legee

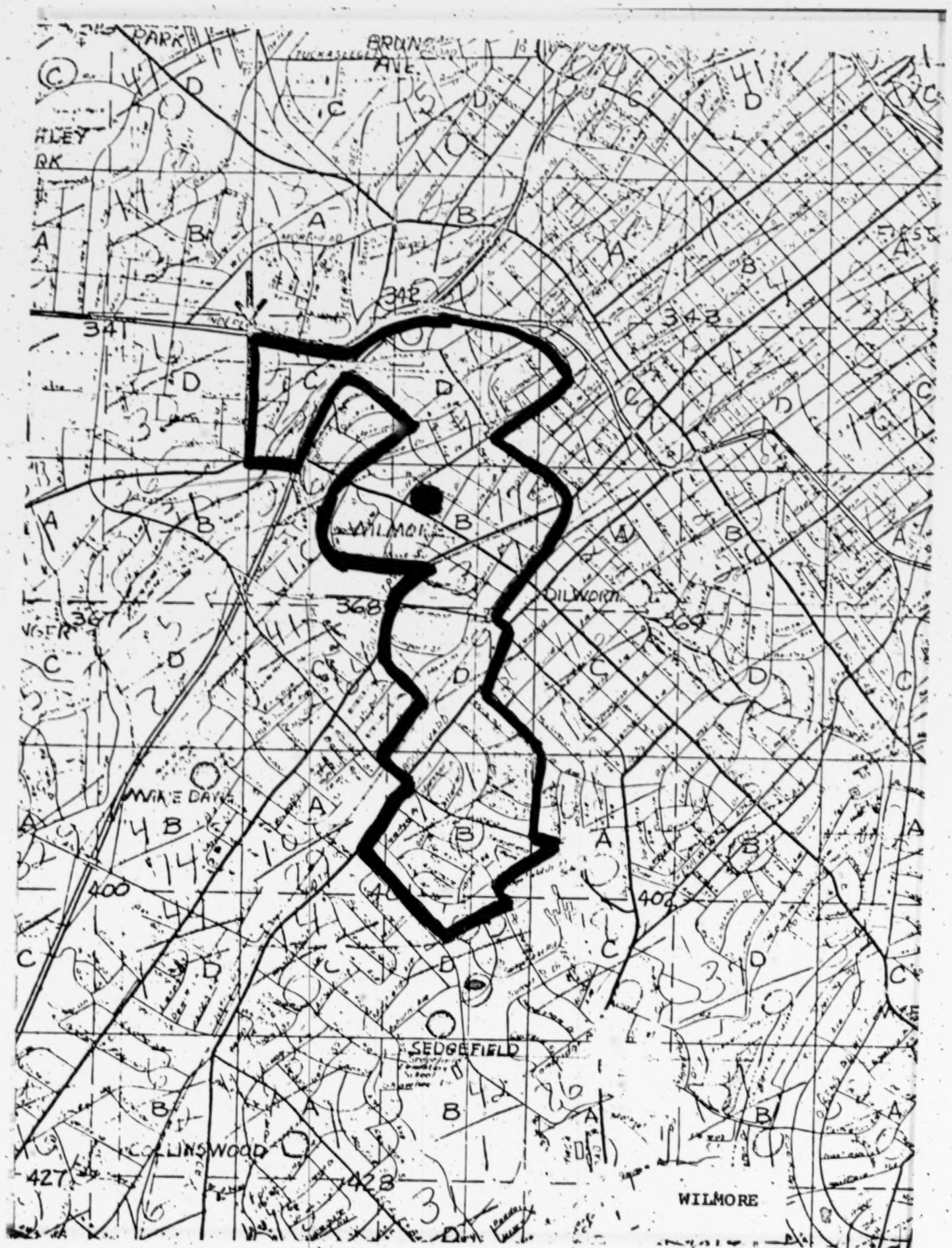
WILMORE SCHOOL ATTENDANCE AREA

Beginning at the 1600 block of Independence Boulevard continue south to the 1100 block of Skyview Road, and south to West Boulevard and Fordham. Then go east on West Boulevard to North-South Expressway. Turn northeast on Expressway to Southern Railroad. Southeast to Merriman and Spruce. Follow line southwest of Merriman Avenue to Abbott Park (excluding Merriman). Follow Wilmore Drive to South Tryon, including both sides of Wilmore Drive. Follow South Tryon southwest to Dunavan. Southeast to railroad. Follow railroad to Remount Road to South Boulevard then southwest on South Boulevard to Marsh Road. Turn south and parallel Marsh Road on north side to Dorchester. Go east parallel Dorchester to 500 block of Poindexter. North on Poindexter to Elmhurst. East cross country to Ideal Way. Ideal Way to Winthrop on Winthrop to Magnolia Avenue then northwest to South Boulevard. South Boulevard in northerly direction to West Tremont. Northeast on Tremont to Camden Road. Camden Road to West Summit Avenue. West Summit to Mint Street to 400 block of Palmer Street to Independence Boulevard. West on Independence Boulevard to 1600 block.

WESTERLY HILLS ATTENDANCE AREA

Ashley Road will divide Ashley Park and Westerly Hills attendance areas. From there the line will run to I-85. On I-85 the line turns left and follows the highway to a point north of Boyer Street. Here the line turns south and takes in houses on both sides of Boyer Street and reaches Wilkinson Boulevard between Boyer Street and house 5108 Boulevard (that house goes to Tuckaseegee). The line then turns east on Wilkinson Boulevard and follows the center of the Boulevard to the city limits. The line then follows the city limit to a point just south of Helena Street. The line then turns east and crosses Markland Drive at the intersection of Fordwood. All houses on Fordwood will come to Westerly Hills and houses 2825 and 2812 and smaller on Kenhill Drive, and houses 3200, 3124 and smaller on Markland will also come, as well as houses 2733 and 2728 and smaller on Mayfair Avenue.

The line then turns north on east side of Mayfair Avenue to intersect Fabor Street and Marene Drive. North to a point on Golf Course Lane and Old Steele Creek Road. East to stream in Golf Course. North to intersection of Old Steele Creek Road and railroad. Follow railroad west to west side of Sparta, turn north to Denver and Morris Field Drive. North to corner of Senore and Carlyle. There the line runs to the right and takes in all houses on Carlyle Drive and leaves all houses on Bristol Drive in Barringer area. Barringer will get all of Midland Avenue and Westerly Hills will pick up Wilson Street. Barringer will get all of Corbett Street, Pruitt Street, and the 2500 block of Heywood Avenue. The line then follows Dublin Road to Ashley Road with Barringer getting both sides of Dublin Road. All house numbers of 2500 and above on Ashley Road will go to Barringer that live on the west side of the street.


PARK
BRUNS AVE.
ALEY PK
341
342
343
WILMOR
DILWORTH
368
369
WADE DAVIS
400
SEDGEFIELD
COLLINGSWOOD
427
428
WILMORE

Here's Map Of New School Districts

This map shows the 30 elementary school districts in which the attendance lines were redrawn. These new lines are scheduled to take effect on April 1, under the desegregation plan ordered by U.S. District Judge James B. McMillan.

But, another 34 elementary schools won't be affected because the U.S. Fourth Circuit Court of Appeals ordered a postponement of implementation of pairing of elementary schools and cross busing. These schools are in the areas designated "paired schools" on the map.

Dr. Chris Folk, assistant to the superintendent of schools, said another eight schools "will not be affected by rezoning or pairing" and hence these lines were left alone.

These schools are Davidson, Cornelius, Huntersville, Long Creek, Bain, Clear Creek, Matthews and Pineville.

Also unaffected is Irwin Avenue School, the special school established under this year's desegregation order. That school will be closed when pairing and cross busing goes into affect, Folk said.

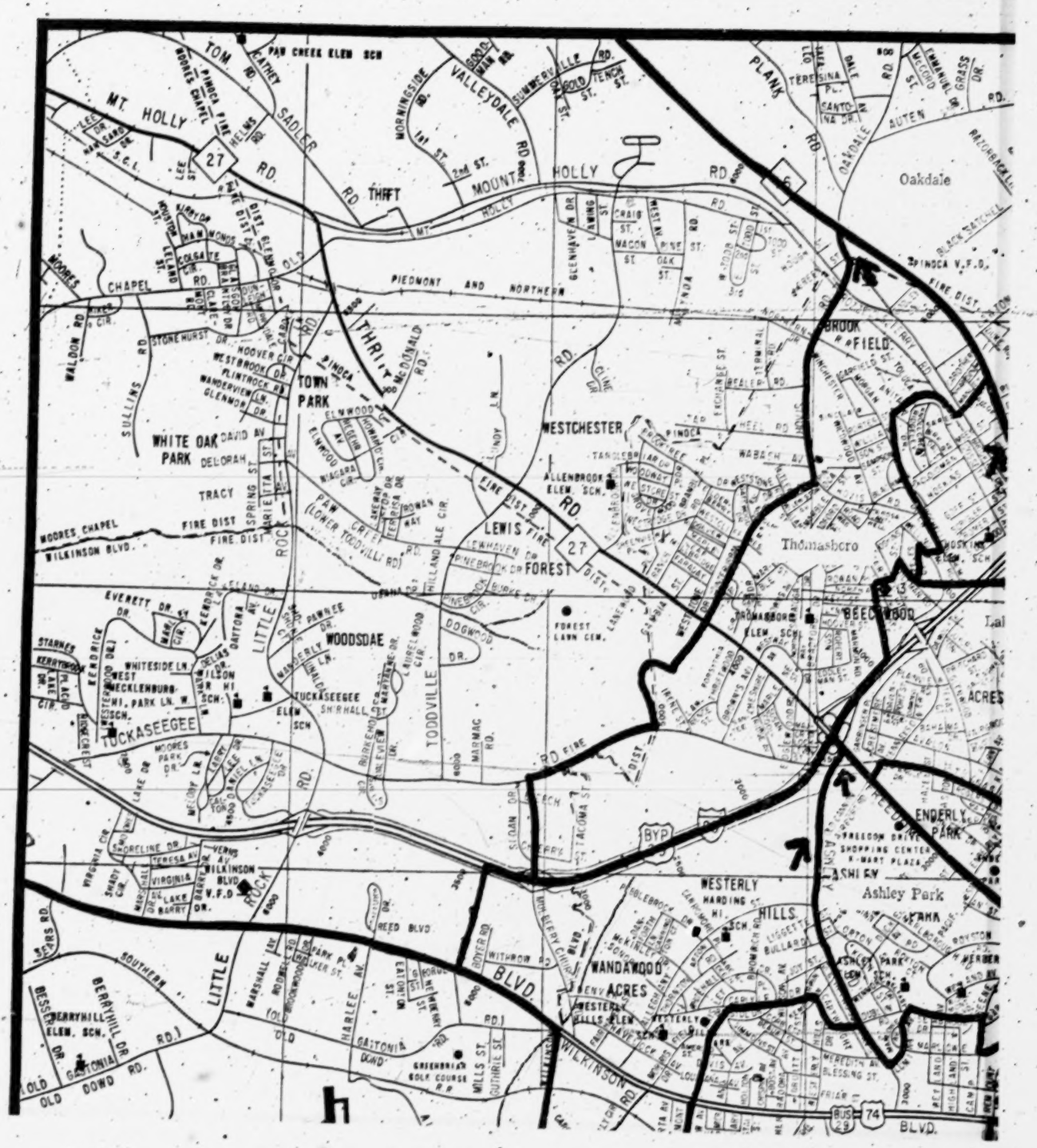
Some of the lines run off the edge of the map. The written descriptions show where these lines go in the county.

Use This Map During Today's TV Show

This map will help you understand today's special television program on the Charlotte-Mecklenburg Schools desegregation case.

The program will be broadcast simultaneously on WTVI (Channel 42) WBTV (Channel 3) and WSOC (Channel 9) at 4 p.m. today.

It will feature a panel of newsmen questioning William E. Poe, chairman of the Charlotte-Mecklenburg School Board, Dr. William Self, superintendent of schools, School Board Member Colemon Kerry and School Board Attorney Ben Horack.



Block By Block Attendance Lines

Continued from Page 7B

7000 block. East to the creek. Follow creek to the East, Starita Road. Southwest along I-85 to East of Avenues: Wilson, "A," "B," and "C," North to 3300 block and west to Beatties Ford Road.

Steele Creek

Beginning at I-77 and South Carolina line north to rear of Colony Acres Development. Northwest cross country—crossing Choyce Avenue at the northeastern intersection of Sheryl Circle and Choyce Avenue. Northwest to Irwin Creek. Follow Irwin Creek to center of York Road Landfill. Nortneast to Yorkmont Road at rear of Potts Hardware Store. North to intersection of Pressley Road and Barringer Drive. North to the eastern end of Crestridge. Northwest to intersection of Fieldcrest and Rollingwood. West to Irwin Creek following Irwin Creek to end of Abiline Road. Southwest crossing Beam Road to intersection of N.C. 160 and Shopton Road. Cross country west to Brown's Cove or county line. Follow county to South Carolina line.

Thomasboro

Begining at the intersection of Belhaven Boulevard and Hovis Road to intersection of Interurban Avenue. The line extends south across Freedom Drive to a point where Weststone enters Freedom. Continue southward to city limits and along Tuckaseegee Road to center of Mulberry Church Road. South on Mulberry Church Road to I-85.

East on I-85 to Ease End Street. North on East End

the intersection of Fordwood.

All houses on Fordwood will come to Westerly Hills and houses 2825 and 2812 and smaller on Kenhill Drive, and houses 3200, 3124 and smaller on Markland will also come, as well as houses 2733 and 2728 and smaller on Mayfair Avenue.

The line then turns north on east side of Mayfair Avenue to intersect Fabor Street and Marene Drive. North to a point on Golf Course Lane and Old Steele Creek Road. East to stream in Golf Course. North to intersection of Old Steele Creek Road and railroad. Follow railroad west to west side of Sparta, turn north to Denver and Morris Field Drive. North to corner of Senore and Carlyle.

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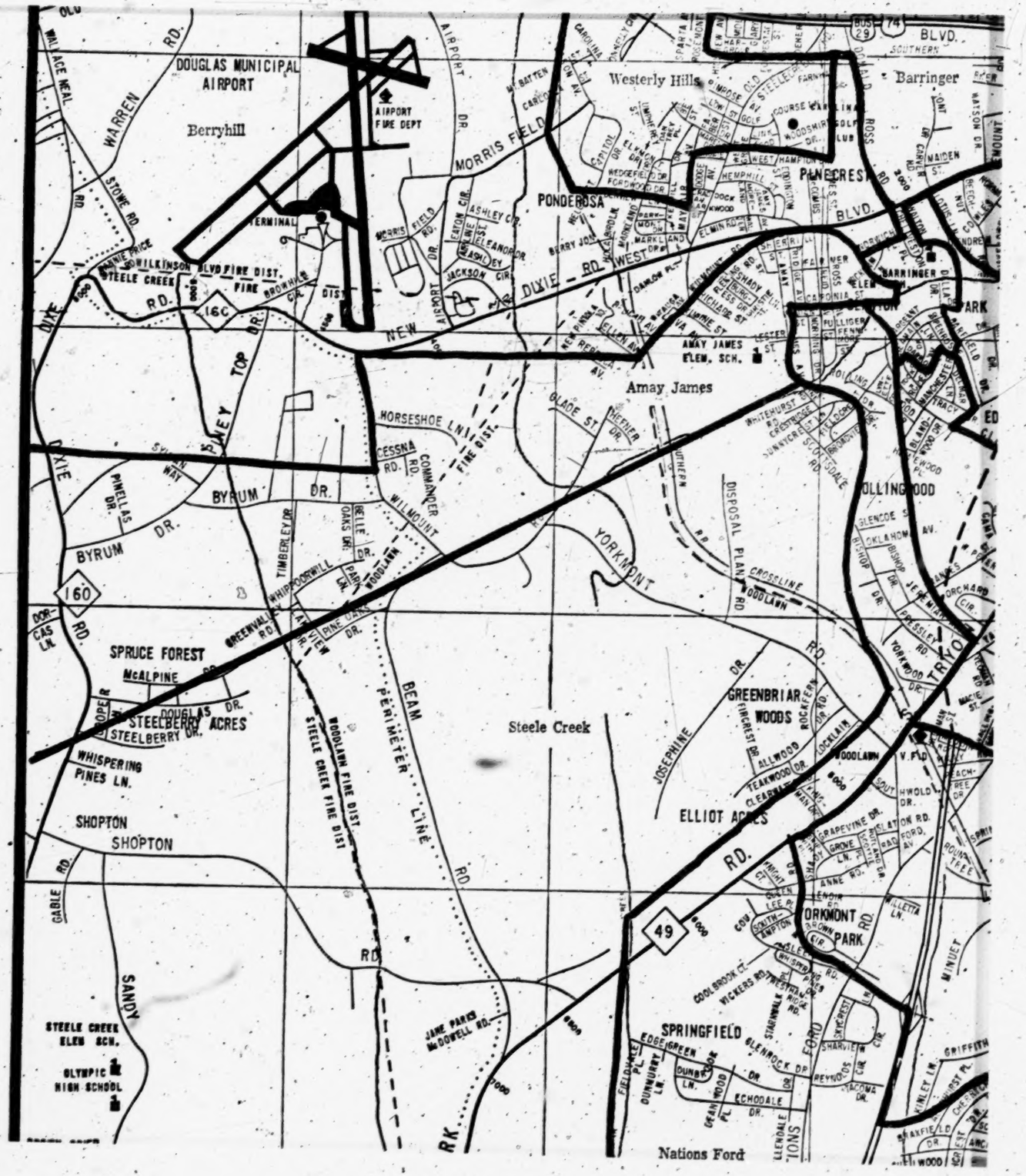
Barringer will get all of Corbett Street, Pruitt Street, and the 2500 block of Heywood Avenue. The line then follows Dublin Road to Ashley Road with Barringer getting both sides of Dublin Road. All house numbers of 2500 and above on Ashley Road will go to Barringer that live on the west side of the street.

Wilmore

Beginning at the 1600 block of Independence Boulevard continue south to the 100 block of Skyview Road, and south to West Boulevard and Fordham. Then go east on West Boulevard to I-77. Turn northeast on



center of York Road Landfill. Northeast to Yorkmont Road at rear of Potts Hardware Store. North to intersection of Pressley Road and Barringer Drive. North to the eastern end of Crestridge. Northwest to intersection of Fieldcrest and Rollingwood. West to Irwin Creek following Irwin Creek to end of Abiline Road. Southwest crossing Beam Road to intersection of N.C. 160 and Shopton Road. Cross country west to Brown's Cove or county line. Follow county to South Carolina line.

Thomasboro

Begining at the intersection of Belhaven Boulevard and Hovis Road to intersection of Interurban Avenue. The line extends south across Freedom Drive to a point where Weststone enters Freedom. Continue southward to city limits and along Tuckaseegee Road to center of Mulberry Church Road. South on Mulberry Church Road to I-85.

East on I-85 to Ease End Street. North on East End Street to Rowan. East across sStreet to Royan. East across Greenwood Drive to Tillman Road. East to railroad. North on railroad to Williamson. East to Rozzell's Ferry Road. South on Rozzell's Ferry to Manley. North including Manley to Belhaven Boulevard North Belhaven to Hovis Road.

Westerly Hills

Ashley Road will divide Ashley Park and Westerly Hills attendance areas. From there the line will run to I-85. On I-85 the line turns left and follows the highway to a point north of Boyer Street. Here the line turns south and takes in houses on both sides of Boyer Street and reaches Wilkinson Boulevard between Boyer Street and house at 5108 Wilkinson Blvd. (that house goes to Tuckaseegee). The line then turns east on Wilkinson Boulevard and follows the south of the Boulevard to the city limits. The line then follows city limit to a point just south of Helena Street. The line then turns east and crosses Markland Drive at and Morris Field Drive. North to corner of Senore and Carlyle.

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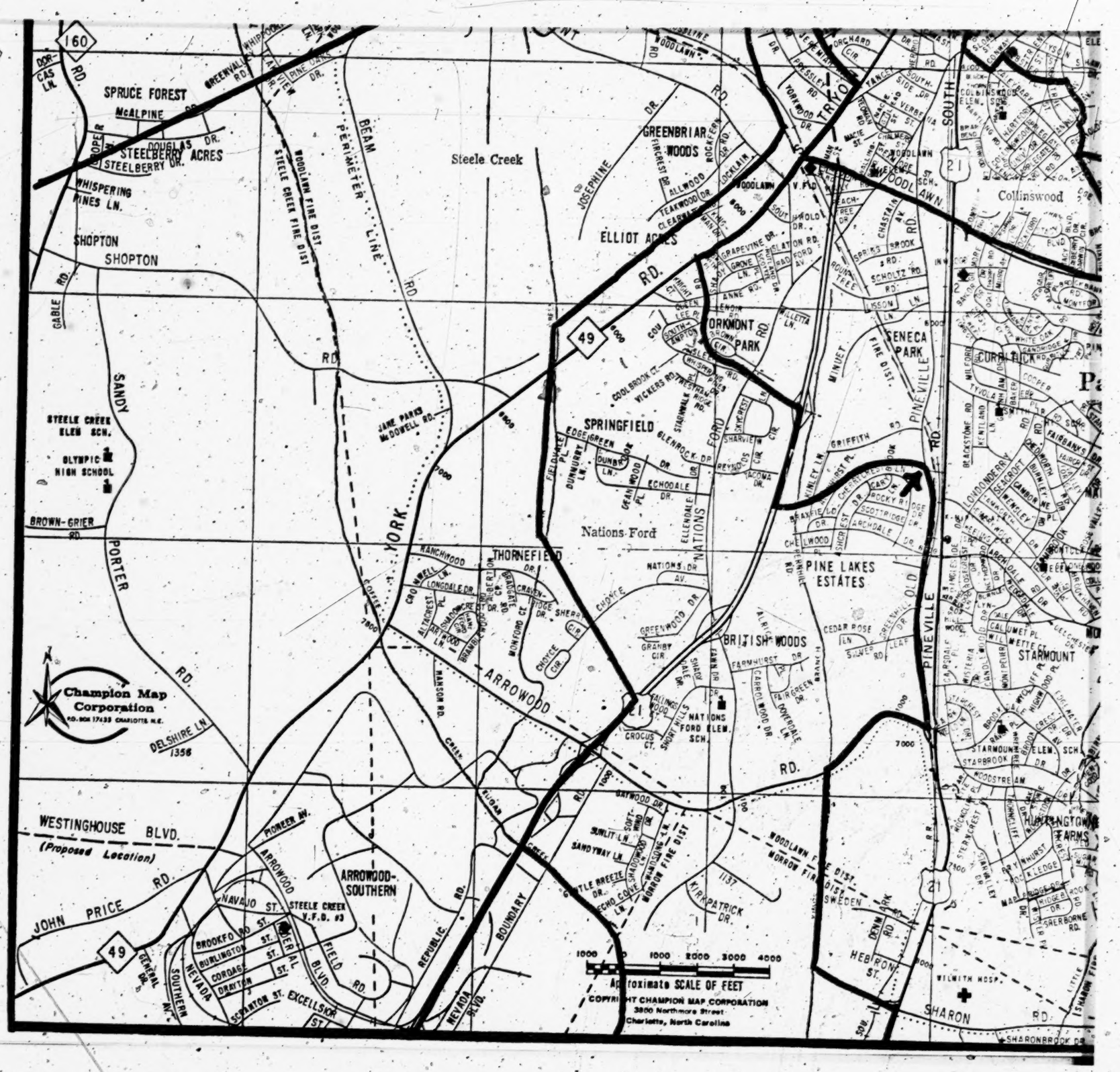
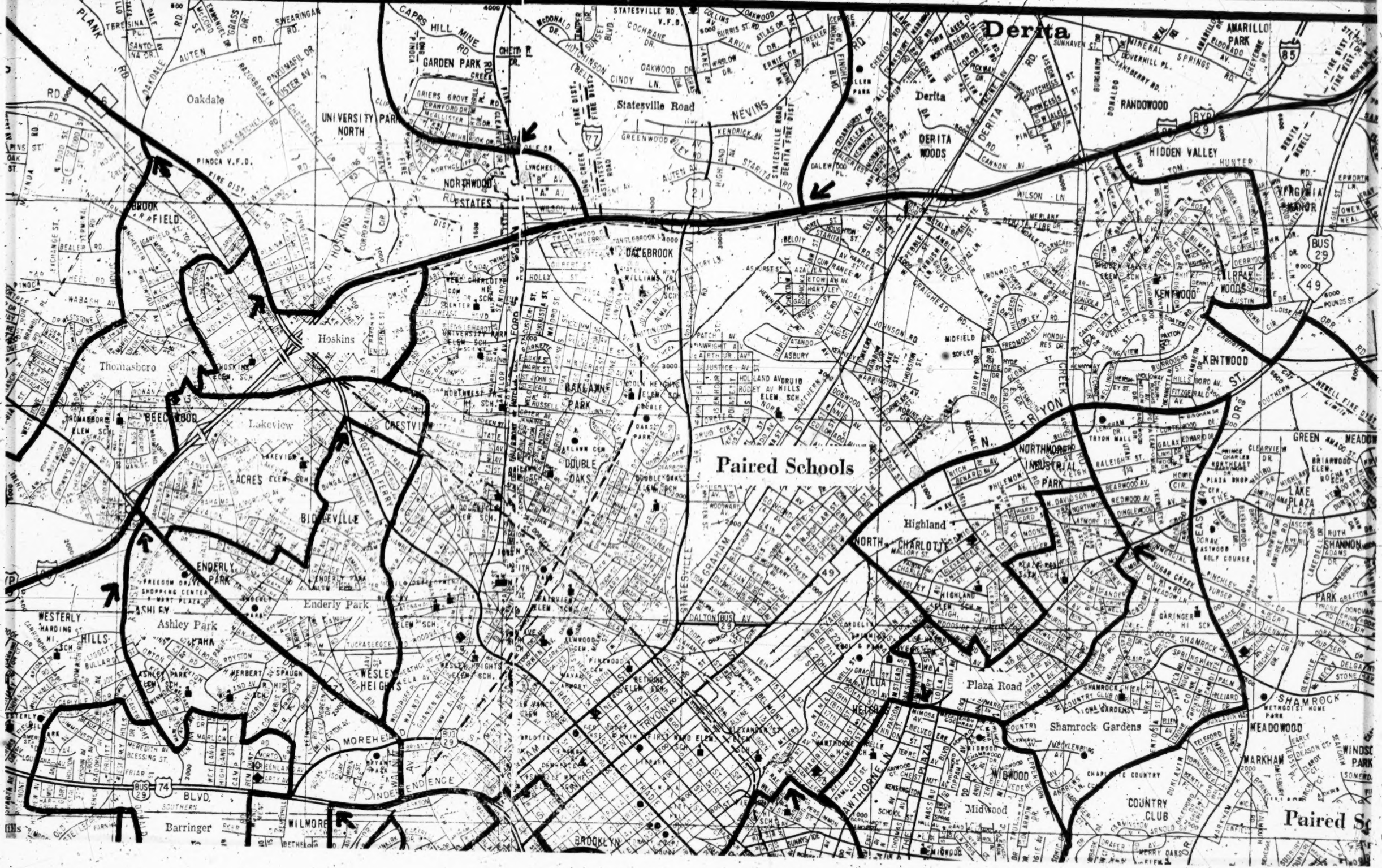
Southeast to railroad. Follow railroad to Remount Road to South Boulevard then southwest on South Boulevard to Marsh Road. Turn south and parallel Marsh Road on north side to Dorchester. Go east parallel Dorchester to 500 block of Poindexter. North on Poindexter to Elmhurst. East cross country to Ideal Way. Ideal Way to Winthrop to Winthrop to Magnolia Avenue then northwest to South Boulevard. South Boulevard in northerly direction to West Tremont. Northeast on Tremont to Camden Road.

Camden Road to West Summit Avenue. West Summit to Mint Street to 400 block of Palmer Street to Independence Boulevard. West on Independence Boulevard to 1600 block.




Paired Schools
Derita
Oakdale
Statesville Road
Hoskins
Thomasboro
Lakeview
Enderly Park
Ashley Park
Barringer
Oakbrook
Highland
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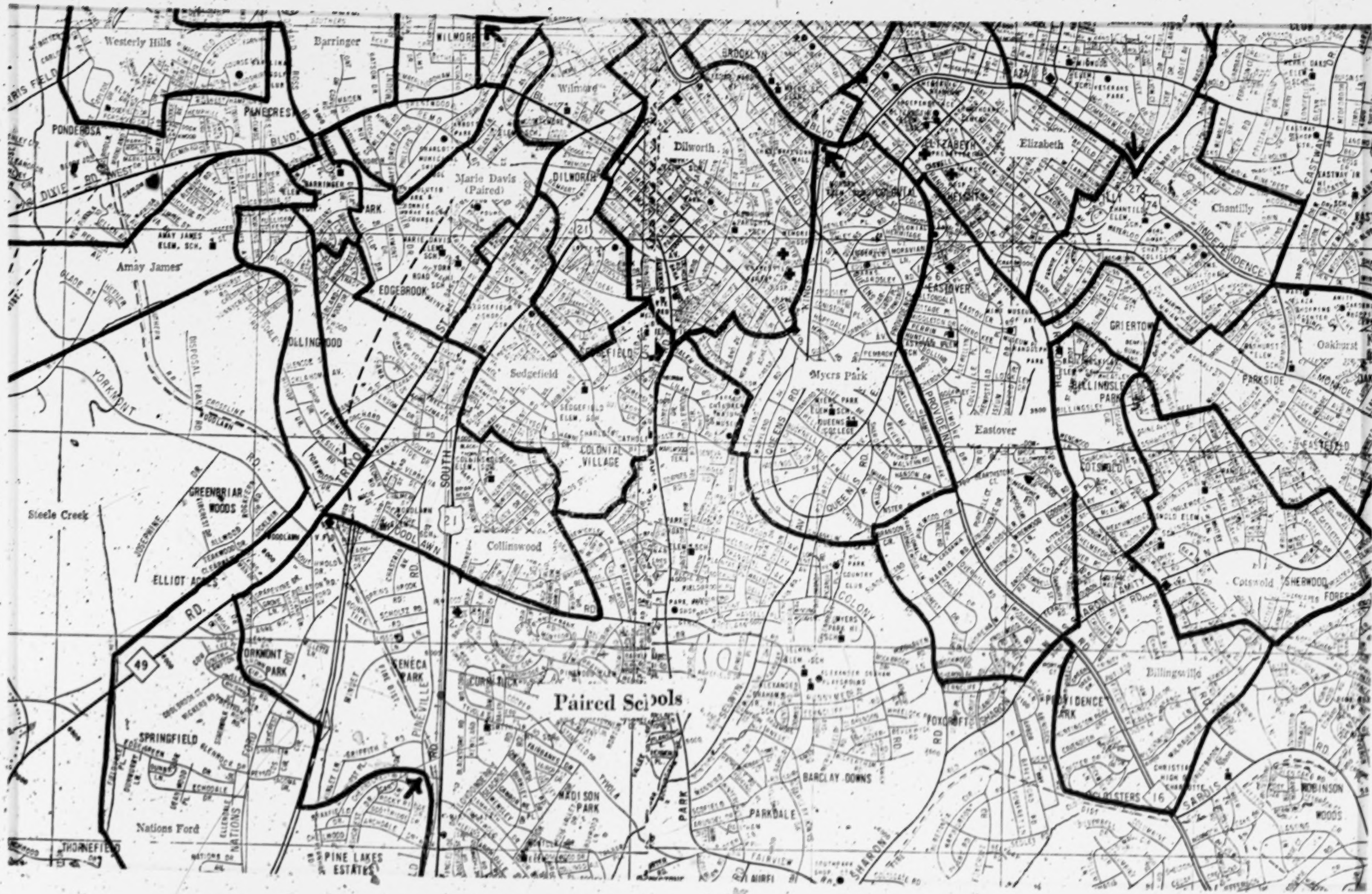
Shamrock Gardens
Midwood
Hidden Valley
Kentwood
Randowood
Derita Woods
Virginia Manor
Meadowood
Country Club
Paired Sc


Westerly Hills
Barringer
Wilmore
Dilworth
Marie Davis (Paired)
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Eastover
Elizabeth
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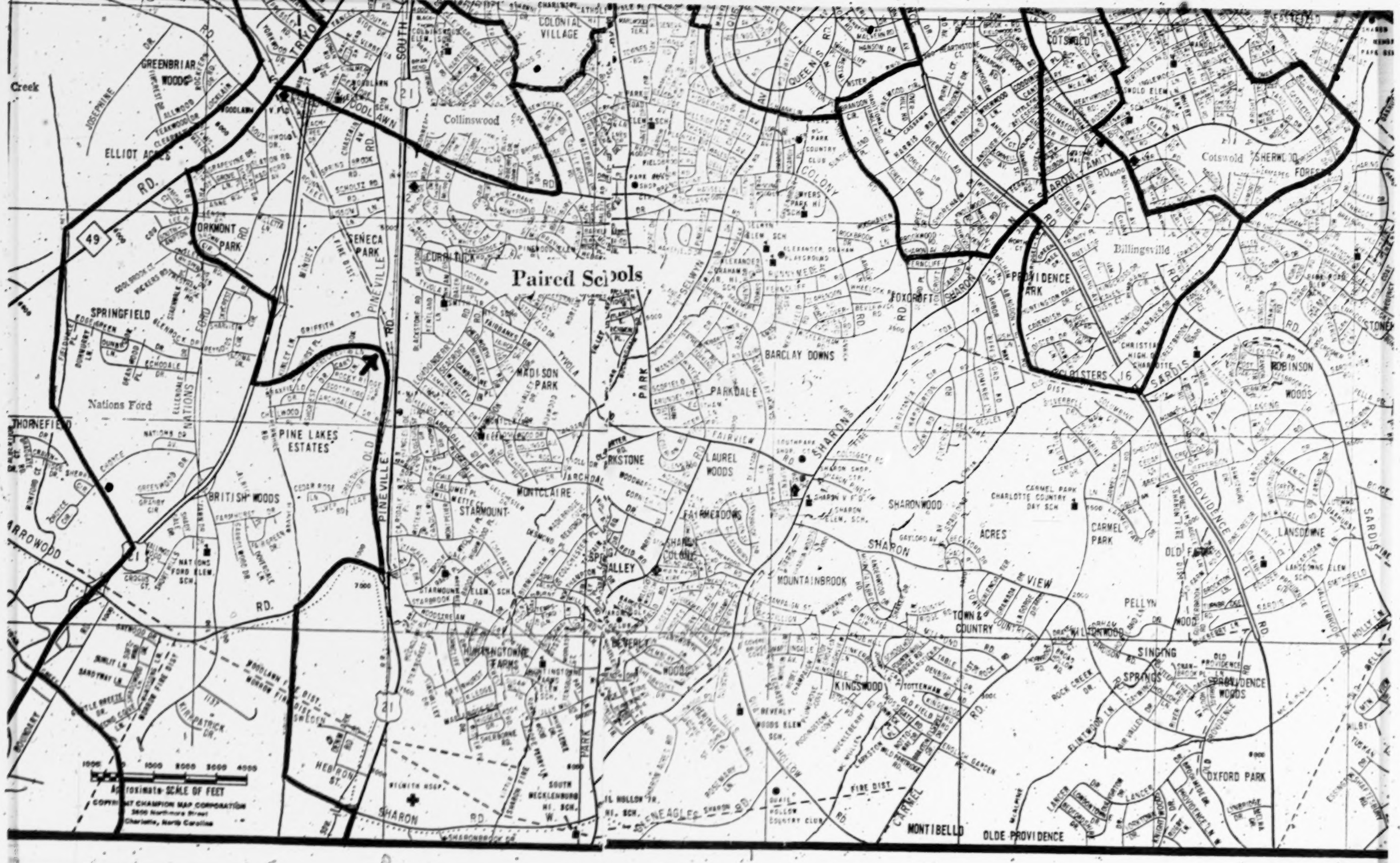
Collinswood
Colonial Village
Steele Creek
Nations Ford
Springfield
Madison Park
Parkdale
Barclay Downs
Billingsville
Paired Schools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GREENBRIAR
WOODS
ELLIOT ACRES
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JOSEPHINE
DR.
TRYON
SOUTH
21
COLONIAL
VILLAGE
Collinswood
WOODLAWN
RD.
49
ORKMONT
PARK
SENECA
PARK
PINEVILLE
RD.
CORNWICK
SPRINGFIELD
FORD
NATIONS
Nations Ford
THORNEFIELD
PINE LAKES
ESTATES
BRITISH WOODS
ARROWOOD
RD.
HEBRON
ST.
MADISON
PARK
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TYVOLA
PARKDALE
FAIRVIEW
LAUREL
WOODS
MONTCLAIRE
STARMOUNT
SPRING
VALLEY
FAIRMEADOWS
SHARON
COLONY
RD.
QUEENSBURY
RD.
BARCLAY DOWNS
FOXCROFT
SHARON
RD.
COTSWOLD
Cotswold
SHERWOOD
FOREST
AMITY
RD.
Billingsville
PROVIDENCE
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SARDIS
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ROBINSON
WOODS
STONEY
SHARONWOOD
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MOUNTAINBROOK
TOWN &
COUNTRY
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CARMEL
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CHARLOTTE COUNTRY
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PELLYN
WALTONWOOD
SINGING
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WOODS
OXFORD PARK
LANSDOWNE
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SARDIS
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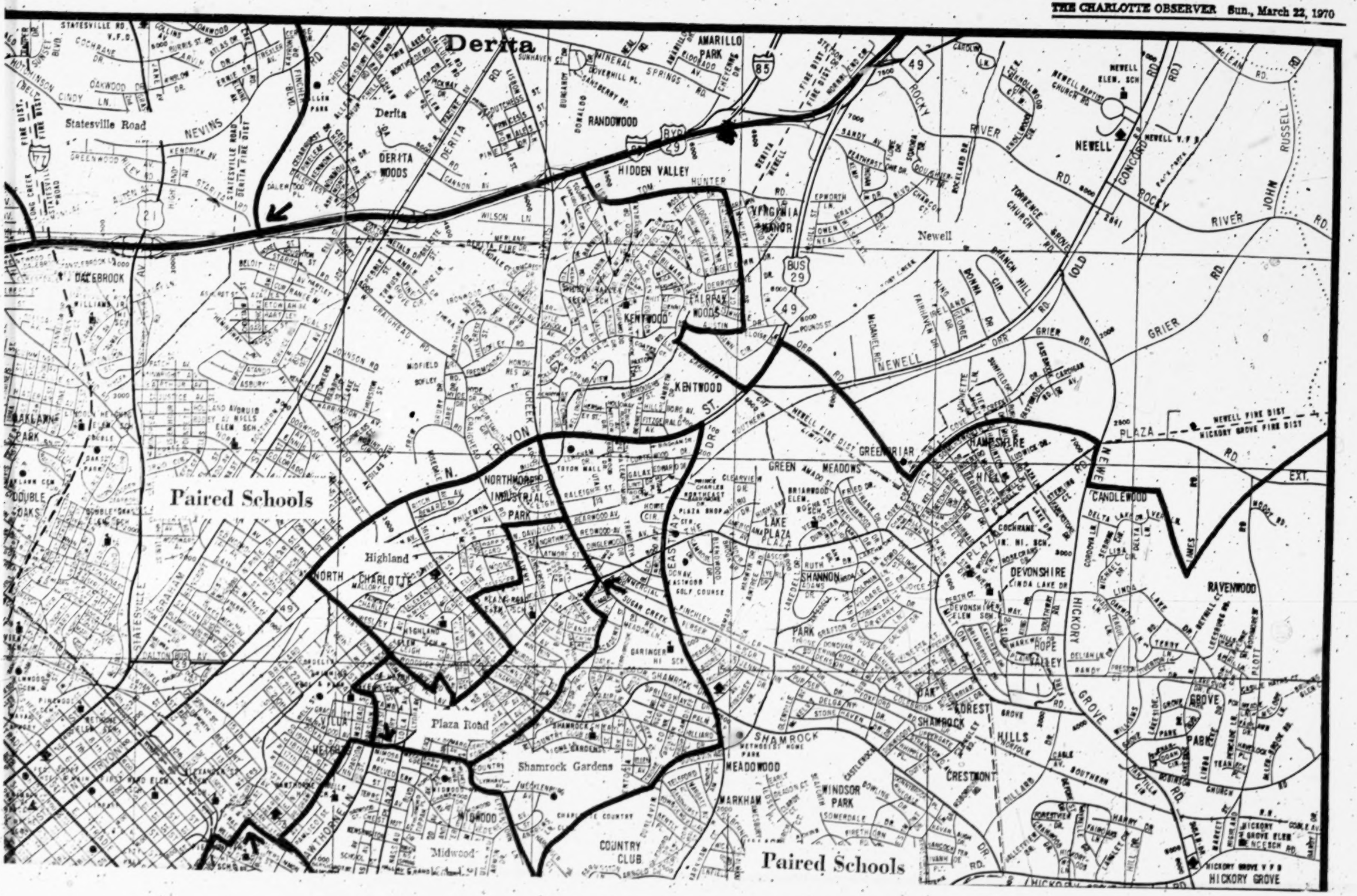
MONTIBELLO
OLDE PROVIDENCE
EAGLES
NEST
RD.
HOLLOW
RD.
SOUTH
MECKLENBURG
HI. SCH.
WILMITH HOSP.
Approximate SCALE OF FEET
COPYRIGHT CHAMPION MAP CORPORATION
3800 Northmore Street
Charlotte, North Carolina


Paired Schools
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Statesville Road
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RANDOLPH
HIDDEN VALLEY
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KENTWOOD
FAIRFAX WOODS
NEWELL
Newell
NEWELL ELEM. SCH
NEWELL BAPTIST CHURCH
TORRENCE CHURCH
OAKBROOK
OAKLAWN PARK
NORTHWOOD PARK
INDUSTRIAL
TRYON HILLS
GREENBRIAR
GREEN MEADOWS
LAKE PLAZA
SHANNON PARK
DEVONSHIRE
CANDLEWOOD
RAVENWOOD
ROPE VALLEY
FOREST HILLS
CRESTMONT
MEADOWOOD
WINDSOR PARK
SHAMROCK
Highland
NORTH CHARLOTTE
Plaza Road
Shamrock Gardens
Midwood
COUNTRY CLUB
HICKORY GROVE
NEWELL FIRE DIST
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GRIER RD.
OLD JOHN RD.
PLAZA
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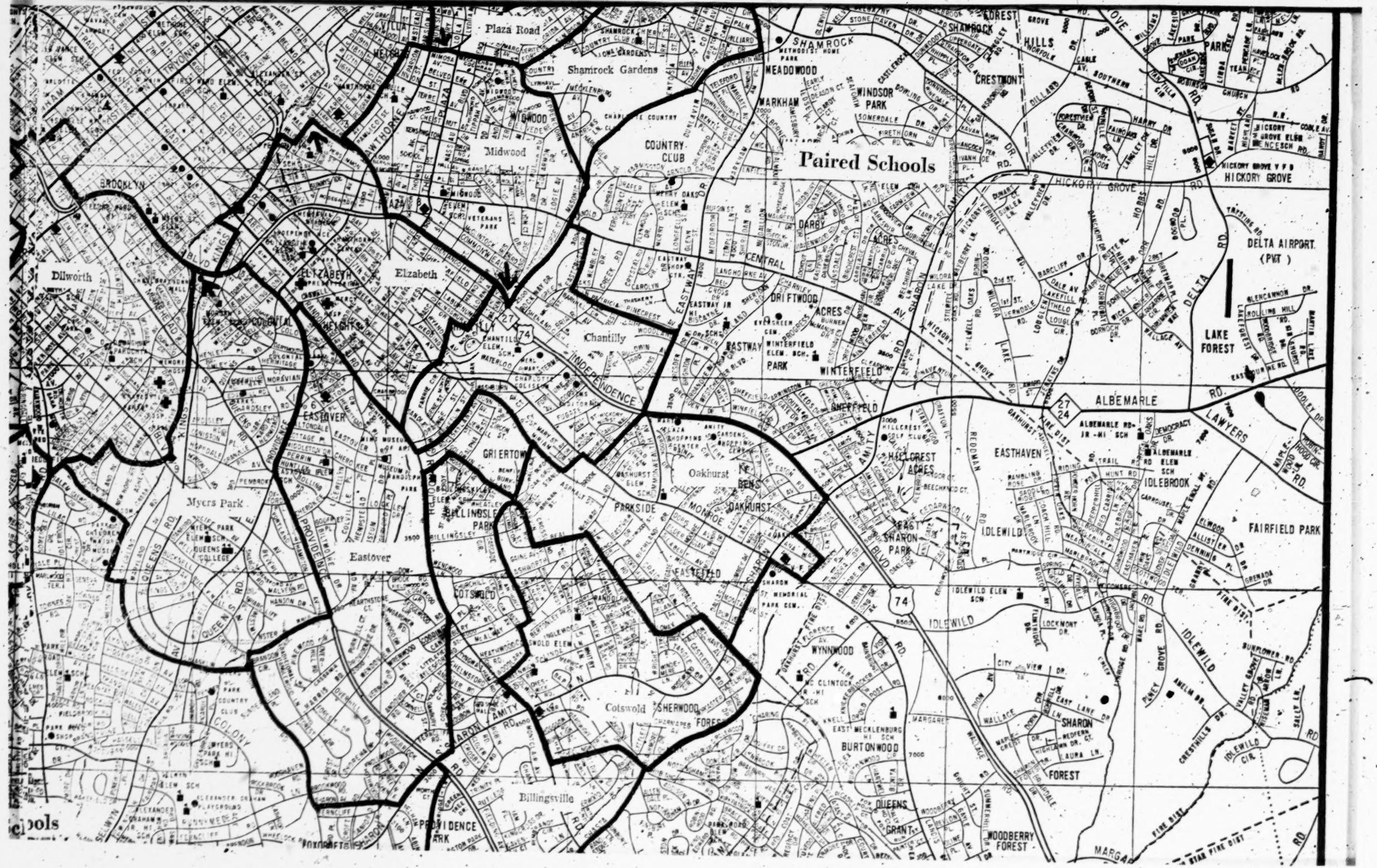
HICKORY GROVE
CHURCH RD.


Paired Schools
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Grier Heights
Sharon
Sharon Park
Idlewild
Eastaven
Woodberry Forest
Fairfield Park
Lake Forest
Delta Airport (Pvt)
Hickory Grove
Albemarle
Crestmont
Windsor Park
Meadowood
Markham
Darby Acres
Driftwood Acres
Winterfield
Hillcrest Acres
Idlebrook
Wynnwood
Burtonwood
Sherwood Forest
Providence Park
Billingsley Park
Parkside
Amity Gardens
Brooklyn
Central
Eastway
Independence
Queens
Providence
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Queen
Monroe
Amity
Sharon
Hickory Grove
Delta
Lawyers
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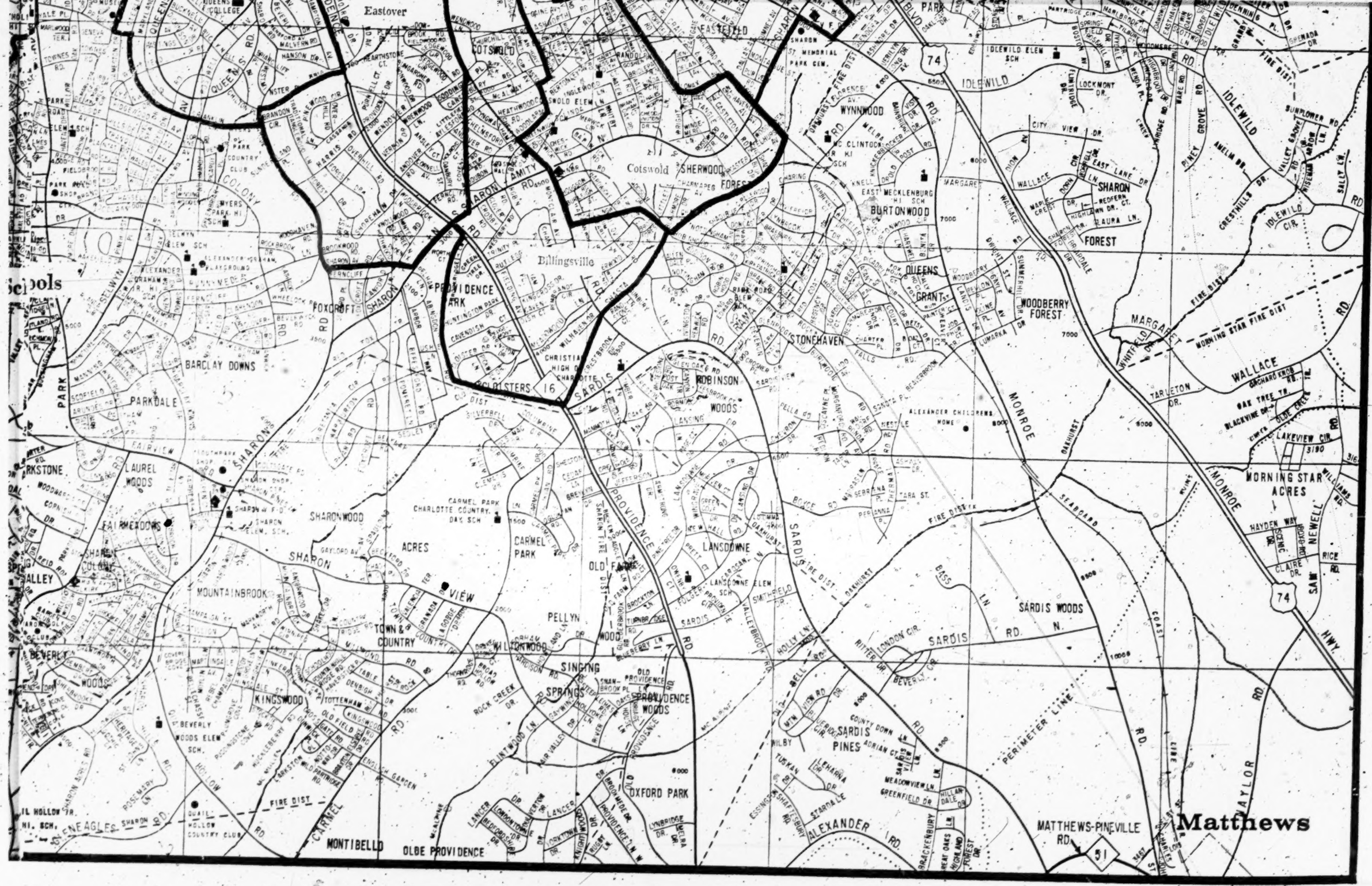
Eastover
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BARCLAY DOWNS
PARKDALE
LAUREL WOODS
FAIRMEADOWS
SHARON COLONY
MOUNTAINBROOK
BEVERLY WOODS
KINGSWOOD
SHARONWOOD ACRES
CARMEL PARK
PELLYN
WILLOWOOD
SINGING SPRINGS
PROVIDENCE WOODS
OXFORD PARK
MONTIBELLO
OLDE PROVIDENCE
ROBINSON WOODS
STONEHAVEN
WYNNWOOD
BURTONWOOD
QUEENS GRANT
FOREST
WOODBERRY FOREST
IDLEWILD
WALLACE
MORNING STAR ACRES
LANSDOWNE
SARDIS WOODS N.
SARDIS PINES
ALEXANDER
MATTHEWS-PINEVILLE RD
Matthews
MONROE
PROVIDENCE
SARDIS
SHARON
QUEENS
COLONY
AMITY
CHRISTIAN HIGH OF CHARLOTTE
CHARLOTTE COUNTRY DAY SCH
MYERS PARK HI SCH
SELWYN
EAST MECKLENBURG HI SCH
ALEXANDER CHILDRENS HOME
SARDIS FIRE DIST
MORNING STAR FIRE DIST
PERIMETER LINE
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SUPREME COURT, U. S.

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JUL 23 1970
E. ROBERT SEAVER, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 444

MRS. ROBERT LEE MOORE, ET AL,
Appellants

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL,
Appellees

On Appeal From A Decision Of A Three-Judge Court In The United States District Court For The Western District Of North Carolina

JURISDICTIONAL STATEMENT

WHITEFORD S. BLAKENEY
North Carolina National Bank Building
Charlotte, North Carolina
Attorney for the Appellants

Of Counsel:
WILLIAM H. BOOE
Law Building
Charlotte, North Carolina

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Cases:

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United States vs. Georgia Public Service Commission, 371 US 285, 83 S Ct 397, 9 L Ed 2d 317 2

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28 USC §1441 6

28 USC § 2281 2

28 USC § 2284 6

General Statutes of North Carolina § 115-176.1 4

Constitution of the United States:

Fourteenth Amendment to the Constitution of the United States 4, 5, 7, 8

IN THE

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OCTOBER TERM, 1970

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---

JURISDICTIONAL STATEMENT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

This case comes to this Court by appeal, and the appellants respectfully present to the Court:

THE OPINION OF THE COURT BELOW

As shown above, the decision from which this appeal is taken was rendered by a three-judge Court in the United States District Court for the Western District of North Carolina. The opinion delivered by that Court has not yet been published in printed reports

but is fully set forth in the Appendix which is attached hereto. The judgment of the lower Court is likewise printed in the attached Appendix.

THE JURISDICTION OF THIS COURT

This suit originated in the North Carolina State Courts. Because the case involved claim of right arising under the Constitution of the United States, it was removed into the United States District Court for the Western District of North Carolina. There, by reason of the applicability of 28 USC § 2281, it was heard by a three-judge court.

The judgment of the three-judge District Court is dated June 22, 1970, and it was entered on that date.

Notice of appeal, directly to this Court, was filed by the plaintiffs on June 23, 1970, in the United States District Court for the Western District of North Carolina.

Jurisdiction of this appeal is conferred on this Court by 28 USC §1253.

Recent examples of the many decisions sustaining the jurisdiction of this Court upon such appeals as this, directly from three-judge district courts, are:— *United States vs. Georgia Public Service Commission*, 371 US 285, 83 S Ct 397, 9 L Ed 2d 317; *Idlewild Bon Voyage Liquor Corp. vs. Epstein*, 370 US 713, 82 S Ct 1294, 8 L Ed 2d 794.

A North Carolina statute is here involved, and question as to whether it, and an injunctive order issued by the North Carolina court, are in harmony or in con-

flict with the United States Constitution, constitutes the essential matter here at issue. The statute reads as follows:

> *"Assignment of pupils based on race, creed, color or national origin prohibited.*—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.
>
> "Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

"The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

"The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit."

General Statutes of North Carolina, § 115-176.1, Vol 3A, p. 173.

QUESTIONS PRESENTED BY THIS APPEAL

Are not the pertinent provisions of the North Carolina statute and the injunctive order issued by the North Carolina court in harmony with the Fourteenth Amendment to the United States Constitution as expounded by *Brown vs. Board of Education*?

If so, then upon the facts and circumstances shown by the record in this case, is not the injunctive order issued by the North Carolina court valid and proper?

STATEMENT OF THE CASE

The appellants, who include white and Negro citizens, residents, parents, children and taxpayers of the

City of Charlotte and County of Mecklenburg, North Carolina, instituted this suit, on February 22, 1970, in the Superior Court of Mecklenburg County, North Carolina.[1] They alleged that the defendant Board of Education was about to put into operation and effect a program, the purpose, plan and design of which was to exclude from public schools and assign to public schools thousands of children in the City of Charlotte and Mecklenburg County solely according to their race and color.

In their complaint, the plaintiffs asserted that this would violate legal rights guaranteed to them by the Fourteenth Amendment to the United States Constitution, as enunciated by the United States Supreme Court in *Brown vs. Board of Education*, 347 US 483 and 349 US 294, and by the North Carolina statute quoted above, General Statutes of North Carolina, § 115-176.1.

The State Court agreed that this was so and issued an order as follows:

"That the defendants are hereby enjoined and restrained from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which any children in the City of Charlotte or Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed

[1]The full caption of the case, setting forth the names of the parties, is printed in the Appendix hereto.

Charlotte-Mecklenburg public school because of their race or color."

The defendants moved the case into the United States District Court for the Western District of North Carolina upon the ground that the plaintiffs were asserting rights involving and drawing into issue provisions of the United States Constitution and that the case was therefore one over which the federal courts properly had jurisdiction. 28 USC § 1441.

The defendants further moved, under 28 USC §2281, for the convening of a three-judge court to pass upon the constitutionality of the aforesaid State statute and, consequently, the validity or invalidity of the aforesaid State Court injunction—such injunction having been issued upon the view that the North Carolina statute and the United States Constitution, as construed in *Brown vs. Board of Education,* are in harmony with each other and that the State court injunction was therefore supported alike by the United States Constitution and the North Carolina statute.

A three-judge court, constituted as required by 28 USC §2284, was thereupon convened. Before it conducted its hearing, however, a single judge of the United States District Court for the Western District of North Carolina "suspended and held in abeyance and of no force and effect" the aforesaid State court injunction "pending the final determination by a three-judge Court or by the Supreme Court of the issues which will be presented to the three-judge

Court." United States District Court Order of March 6, 1970.

Prior to the hearing before the three-judge court, all essential questions of fact in the case became resolved through the defendants' answers to the factual allegations of the plaintiffs' complaint and by later discovery proceedings in the form of requests for admissions and answers thereto.

The three-judge Court held its hearing on March 24, 1970. On the same day, it heard a related case, *Swann, et al vs. Charlotte-Mecklenburg Board of Education.*[1]

On April 29, 1970, the three-judge Court rendered its decision. The Court struck down a central provision of the State statute and of the State Court injunction. The statute provides that "no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins." The Court ruled that this provision is unconstitutional, for that, according to the holding of the Court, the Fourteenth Amendment to the United States Constitution requires that children may be assigned and compelled to attend public schools according to race and for the very purpose of "creating a balance or ratio of race."

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[1]Since then the *Swann* case has been heard, in previously litigated aspects, by the United States Court of Appeals for the Fourth Circuit and is now before this Court, in those aspects, upon a grant of Writ of Certiorari.

Thus, the Court, in its "Final Judgment" adjudged the statutory provision, forbidding school assignments according to race, to be "unconstitutional, void and of no effect," and declared that "all parties are hereby enjoined from enforcing, or seeking" to enforce this prohibition against racial assignments.

The plaintiffs, believing and contending that this ruling is a direct and basic and complete contradiction of the meaning of the Fourteenth Amendment to the United States Constitution as construed and established by *Brown vs. Board of Education*, now appeal to this Court.

THE SIGNIFICANCE OF THIS CASE

This case concisely presents the issue which lies at the heart of today's great legal controversy in the realm of race and the public schools, namely:—In public school assignments, does the United States Constitution require freedom without regard to race, or may it require compulsion according to race?

The plaintiffs, upon brief and argument, will endeavor to show to the Court that on this issue, the former alternative and not the latter is the only true answer—the only answer that does not fatally conflict with fundamental freedom—the only answer which does not create unending dilemmas of illogic and inconsistency—the only answer which can actually be carried into effect.

The plaintiffs' present purpose, however, is to emphasize that "the time" having come, as the Chief

Justice recently declared,[1] "to clear up" at least some of the confusion in this field, the present case is a most apt vehicle for doing so.

Most of the public school cases coming before the appellate courts have been quite complex and tangled, characterized by voluminous records, intricate pleadings and highly controverted and unresolved fact situations, and overlarded with orders and rulings that are often ambiguous and usually more administrative than judicial in nature.

By contrast, the present case is wholly uncomplicated, the record is notably simple, the necessary factual background is established beyond controversy, the issue of the case is sharply focused, and the court orders involved are directly to the point.

The plaintiffs alleged in their complaint, and the defendants admitted in their answer, that the United States District Court for the Western District of North Carolina has found it to be a fact:—That in the Charlotte-Mecklenburg Public School System, there is "no racial discrimination" in the expenditure of "money" or the "providing" of "facilities" and no "inequality based upon racial motives" with respect to the "quality" of "teachers" or "books" or "school buildings" or "athletics" or "school fees" or "free lunches" or "elective courses" or the "evaluation of students"; that in the Charlotte-Mecklenburg Public School System, each year any pupil is at liberty "to request assign-

[1] *Northcross vs. Board of Education of Memphis, Tennessee,* —US—, 90 S Ct.—, 25 L Ed 2d 246, 250.

ment to another school," and "no reason for transfer need be given," and "all transfer requests are honored," unless the school to which transfer is requested is "full"; that the Charlotte-Mecklenburg Board of Education has "achieved a degree and volume" of inter-mixing of Negro children and white children in the Charlotte-Mecklenburg public schools which has "exceeded" the "performance" of "any school board whose actions have been reviewed in appellate court decisions."

It is further alleged and admitted that the intermixing of the many thousands of white children and the many thousands of Negro children, who now attend schools and classrooms together in Charlotte and Mecklenburg County, has come about without denial of access to any child at any school because of his race or compulsory assignment of any child to any school because of his race.

Yet, as is further alleged and admitted, the same United States District Court which made the findings of fact outlined above has ordered the defendant Charlotte-Mecklenburg Board of Education to implement, and the Board is about to proceed with implementing, a program under which children in Charlotte and Mecklenburg County, solely because of their race and color, are to be denied access to schools they wish to attend and, solely because of their race and color, are to be compelled to attend schools they do not wish to attend.

Still further, as is alleged and admitted, the United States District Court has ordered the Charlotte-Mecklenburg Board of Education to enforce such denials and such compulsions as "a continuing program" and to "maintain" this program as a "continuing control over the race of children in each school, such as was done for many decades before *Brown vs. Board of Education*." The District Court thus expressly and avowedly returns to a governmental policy of determining and permanently controlling the assignment of children to public schools on the basis of race—the same denial of individual liberty and the same offense against the United States Constitution which *Brown vs. Board of Education* sought to outlaw forever.

Even further, the issue is sharply etched in this case. The record includes exhibits which show that under the "program" ordered by the District Court, the boundaries of the attendance districts or zones in the Charlotte-Mecklenburg Public School System are about to be redrawn in a manner constituting obvious and grotesque gerrymandering. Such exhibits also show the "pairing" of numerous schools in the Charlotte-Mecklenburg Public School System for the purpose of requiring children in those schools to travel outside their own zone and district in order to attend school.

Through discovery procedure, it stands admitted and established in the record that this redrawing of attendance district boundaries and also this "pairing" of numerous schools "is shaped and controlled by

racial considerations" and "by a conscious and purposeful effort to obtain and to require a certain "racial ratio" in "each school."

Thus, the extraordinary but undeniably true picture here presented is that of a public school "program" for Charlotte and Mecklenburg County, under which the color of the children will be the dominant criterion—the all-controlling imperative. The child's color will determine what the school authorities do with him.

Because of the children's race—and for no other reason—the school attendance directives are to be reshaped, no matter how unnaturally or tortuously. Because of their race—and for no other reason—thousands of these children, black and white, are to be taken, against their will, out of the schools they have attended and compelled to go to more distant locations and there attend school—no matter how ruthless the violation of their freedom, no matter how serious the effects upon them and their families and no matter how great the resulting cost to the taxpaying public.

This force and compulsion in so vital an area of life, imposed by government on the child, solely because of his race—and subsumed in the current phrase, "involuntary busing—has aroused widespread, intense and unrelenting opposition among the plaintiffs, white and black, and the citizens, parents, children, residents and taxpayers for whom they speak.

Against this stark factual background, the clash of the court orders which have been issued in this case is equally direct and vivid. The State Court determined that, upon this factual showing, it was justified, by *Brown vs. Board of Education* and by North Carolina statute alike, in ordering the Charlotte-Mecklenburg Board of Education not to deny any children "access to any Charlotte-Mecklenburg Public School because of their race or color" and not to compel any children "to attend any prescribed Charlotte-Mecklenburg Public School because of their race or color."

The United States District Court, as hereinbefore pointed out, "suspended and held in abeyance and of no force and effect" the State Court order "pending the final determination by a three-judge Court or by the Supreme Court of the issues which will be presented to the three-judge Court."

Then the three-judge Court issued "final judgment" simultaneously voiding the North Carolina Statute and the State Court injunction, upon the ground that it is "unconstitutional" to prescribe that "no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins."

Thus, there is posed in this case as clearly as can ever be presented, the central issue of this great and urgent controversy, that is, whether *Brown vs. Board of Education* is indeed now reversed—and whether the

United States Constitution does indeed now command that children may be denied access to public schools, and compulsorily assigned to public schools, according to their race and their color—and whether a statute and a court injunction are indeed "unconstitutional" if, in a case such as this, they forbid such denial and such compulsion.

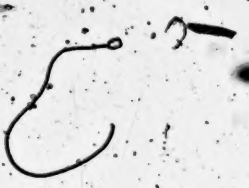
CONCLUSION

Upon all of the foregoing, the appellants pray the Court to note probable jurisdiction of this case and to order the case set for full hearing and argument upon the merits.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Appellants

APPENDIX



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OPINION OF THE COURT BELOW

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil No. 1974

JAMES E. SWANN, et al., *Plaintiffs,*

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDIN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, *Defendants,*

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON

ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Civil No. 2631

MRS. ROBERT LEE MOORE, et al.,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools,

Defendants.

THREE-JUDGE COURT

(Heard March 24, 1970 Decided April 29, 1970.)

Before CRAVEN and BUTZNER, Circuit Judges, and McMILLAN, District Judge.

Mr. J. LeVonne Chambers (Chambers, Stein, Ferguson & Lanning) and James M. Nabrit, III, for Plaintiffs in No. 1974; Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) and Mr. Benjamin Horack, for Defendants in No. 1974; Mr. Ralph Moody, Deputy Attorney General, and Mr.

Andrew A. Vanore, Jr., Assistant Attorney General for State Defendants and Additional Parties-Defendant in No. 1974; and Mr. William H. Booe and Mr. Whiteford S. Blakeney, for other Additional Parties-Defendant in No. 1974.

Mr. William H. Booe and Mr. Whiteford S. Blakeney for Plaintiffs in No. 2631; and Mr. William J. Waggoner (Weinstein, Waggoner, Sturges, Odom & Bigger) for Defendants in No. 2631.

CRAVEN, Circuit Judge:

This three-judge district court was convened pursuant to 28 U.S.C. § 2281, et seq. (1964), to consider a single aspect of the above-captioned case: the constitutionality and impact of a state statute, N. C. Gen. Stat. § 115-176.1 (Supp. 1969), known as the anti-bussing law, on this suit brought to desegregate the Charlotte-Mecklenburg school system. We hold a portion of N. C. Gen. Stat. § 115-176.1 unconstitutional because it may interfere with the school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment.

I.

On February 5, 1970, the district court entered an order requiring the Charlotte-Mecklenburg School Board to desegregate its school system according to a court-approved plan. Implementation of the plan could require that 13,300 additional children be

bussed.[1] This, in turn, could require up to 138 additional school buses.[2]

Prior to the February 5 order, certain parties filed a suit, entitled *Tom B. Harris, G. Don Roberson, et al. v. William C. Self, Superintendent of Charlotte-Mecklenburg Schools and Charlotte-Mecklenburg Board of Education*, in the Superior Court of Mecklenburg County, a court of general jurisdiction of the State of North Carolina. Part of the relief sought was an order enjoining the expenditure of public funds to purchase, rent or operate any motor vehicle for the purpose of transporting students pursuant to a desegregation plan. A temporary restraining order granting this relief was entered by the state court, and, in response, the *Swann* plaintiffs moved the district court to add the state plaintiffs as additional parties defendant in the federal suit, to dissolve the state restraining order, and to direct all parties to cease interfering with the federal court mandates. Because it appeared that the constitutionality of N. C. Gen. Stat. § 115-176.1 (Supp. 1969) would be in question, the district court requested designation

[1]On March 5, 1970, the Fourth Circuit Court of Appeals stayed that portion of the district court's order requiring busing of students pending appeal to the higher court.

[2]There is a dispute between the parties as to the additional number of children who will be bussed and as to the number of additional buses that will be needed. For our purposes, it is immaterial whose figures are correct. The figures quoted are taken from the district judge's supplemental findings of fact, filed March 24, 1970.

of this three-judge court on February 19, 1970. On February 25, 1970, the district judge granted the motion to add additional parties. Meanwhile, on February 22, 1970, another state suit, styled *Mrs. Robert Lee Moore, et al. v. Charlotte-Mecklenburg Board of Education and William C. Self, Superintendent of Charlotte-Mecklenburg Schools*, was begun. In this second state suit, the plaintiffs also requested an order enjoining the school board and superintendent from implementing the plan ordered by the district court on February 5. The state court judge issued a temporary restraining order embodying the relief requested. and on February 26, 1970, the *Swann* plaintiffs moved to add Mrs. Moore, *et al.*, as additional parties defendant in the federal suit. On the same day, the state defendants filed a petition for removal of the *Moore* suit to federal court. On March 23, 1970, the district judge requested a three-judge court in the removed *Moore* case, and this panel was designated to hear the matter. All the cases were consolidated for hearing, and the court heard argument by all parties on March 24, 1970.

II.

N. C. Gen. Stat. § 115-176.1 (Supp. 1969) reads:

> Assignment of pupils based on race, creed, color or national origin prohibited.—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national orgin. No school attendance

district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

It is urged upon us that the statute is far from clear and may reasonably be interpreted several different ways.

(A) Plaintiffs read the statute to mean that the school board is prevented from complying with its duty under the Fourteenth Amendment to establish a unitary school system. See, *e.g., Green v. County School Bd. of New Kent County*, 391 U.S. 430, 439 (1968). In support of this contention, plaintiffs argue that the North Carolina General Assembly passed § 115-176.1 in response to an April 23, 1969, district court order, which required the school board to submit a plan to desegregate the Charlotte schools for the 1969-70 school year. Under plaintiffs' interpretation of the statute, the board is denied all desegration tools except nongerrymandered geographic zoning and freedom of choice. Implicit in this, of course, is the suggestion that zoning and freedom of choice will be ineffective in the Charlotte context to disestablish the asserted duality of the present system.

(B) The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race. Implicit in this argument is that any school system is *per se* unitary if it is zoned according to neighborhood patterns that are not the result of officially sanctioned racial discrimination. Although the Attorney General emphasizes the expression of state policy by the Legislature in favor of the neighborhood school concept, he recognizes, of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus, the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation to nongerrymandered geographic zoning and freedom of choice.

(C) The school board's interpretation of the statute is more ingenious. The board concedes that the statute prohibits assignment according to race, assignment to achieve racial balance, and involuntary bussing for either of these purposes, but contends that the facial prohibitions of the statute

only apply to prevent a school board from doing more than necessary to attain a unitary system. The argument is that since the statute only begins to operate once a unitary system has been established, it in no way interferes with the board's constitutional duty to desegregate the schools. Counsel goes on to insist that Charlotte-Mecklenburg presently has a unitary system and, therefore, that the state court constitutionally applied the statute to prevent further unnecessary racial balancing.

(D) Plaintiffs in the *Harris* suit contend (1) that in 42 U.S.C. §§ 2000c(b) and 2000c-6(a)(2) (1964)[3] Congress expressly prohibited assignment and bussing to achieve racial balance, (2) that to compel a child to attend a school on account of his

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[3] § 2000c:

As used in this subchapter—

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

§ 2000c-6(a):

(2) [P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

race or to compel him to be involuntarily bussed to achieve a racial balance violates the principle of *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954), and (3) that N.C. Gen. Stat. § 115-176.1 merely embodies the principle of the neighborhood school in accordance with *Brown* and the Civil Rights Act of 1964. We may dispose of the first contention at once. The statute "cannot be interpreted to frustrate the constitutional prohibition [against segregated schools]." *United States v. School Dist. 151 of Cook Co.*, 404 F. 2d 1125, 1130 (7th Cir. 1968).

(E) Plaintiffs in the *Moore* suit argue that the district court order of February 5, 1970, was in contravention of *Brown* and, therefore, that the state court order in their suit was justified. However, the *Moore* plaintiffs also argue that certain parts of the second and third paragraphs in the state statute are unconstitutional because they give the school board the authority to assign children to schools for whatever reasons the board deems necessary or sufficient. The *Moore* plaintiffs interpret these portions of the statute as permitting assignment and bussing on the basis of race contrary to *Brown* and the Fourteenth Amendment.

III.

Federal courts are reluctant, as a matter of comity and respect for state legislative judgment and discretion, to strike down state statutes as unconstitutional, and will not do so if the statute reasonably can

be interpreted so as not to conflict with the federal Constitution. But to read the statute as innoculously as the school board suggests would, we think, distort and twist the legislative intent. We agree with plaintiffs and the Attorney General that the statute limits the remedies otherwise available to school boards to desegrate the schools. The harder question is whether the limitation is valid or conflicts with the Fourteenth Amendment. We think the question is not so easy, and the statute not so obviously unconstitutional, that the question may lawfully be answered by a single federal judge, see *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Bailey v. Patterson*, 369 U.S. 31 (1962), and we reject plaintiffs' attack upon our jurisdiction. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965); C. Wright, Law of Federal Courts § 50 at 190 (2d ed. 1970).

In *Green v. County School Bd. of New Kent Co.*, 391 U.S. 430 (1968), the Supreme Court declared that a school board must take effective action to establish a unitary, nonracial system, if it is not already operating such a system. The Court neither prohibited nor prescribed specific types of plans, but, rather, emphasized that it would judge each plan by its ultimate effectiveness in achieving desegregation. In *Green* itself, the Court held a freedom-of-choice plan insufficient because the plan left the school system segregated, but stated that, under the circumstances existing in New Kent County, it appeared that the school board could achieve a unitary system

either by simple geographical zoning or by consolidating the two schools involved in the case. 391 U.S. at 442, n. 6. Under *Green* and subsequent decisions, it is clear that school boards must implement plans that work to achieve unitary systems. *Northcross v. Bd. of Ed. of the Memphis City Schools*, ___ U.S. ___, 38 L.W. 4219 (1970); *Alexander v. Holmes Co. Bd. of Ed.*, 396 U.S. 19 (1969). Plans that do not produce a unitary system are unacceptable.[1]

We think the enunciation of policy by the legislature of the State of North Carolina is entitled to great respect. Federalism requires that whenever it is possible to achieve a unitary system within a framework of neighborhood schools, a federal court ought not to require other remedies in derogation of state policy. But if in a given fact context the state's expressed preference for the neighborhood school cannot be honored without preventing a unitary system, it is

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[1] The reach of the Court's mandate is not yet clear:

> [A]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

Northcross v. Bd. of Ed. of the Memphis City Schools, — U. S. —, 38 L.W. at 4220 (1970) (Chief Justice Burger, concurring). For our purposes, it is sufficient to say that the mandate applies to require "reasonable" or "justifiable" solutions. *See generally* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965).

the former policy which must yield under the Supremacy Clause.

Stated differently, a statute favoring the neighborhood school concept, freedom-of-choice plans, or both can validly limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system. That it may or may not depends upon the facts in a particular school system. The flaw in this legislation is its rigidity. As an expression of state policy, it is valid. To the extent that it may interfere with the board's performance of its affirmative constitutional duty to establish a unitary system, it is invalid.

The North Carolina statute, analyzed in light of these principles, is unconstitutional in part. The first paragraph of the statute reads:

> No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown* I).

The third paragraph of the statute reads:

> The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

This paragraph merely allows the school board non-invidious discretion to assign students to schools for valid administrative reasons. As we read it, it does not relate to race at all and, so read, is constitutional.

The fourth paragraph provides:

> The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

This paragraph relieves school boards from compliance with the statute where they are implementing voluntarily adopted freedom-of-choice plans within their systems. It does not require the boards to adopt freedom of choice in any particular situation, but leaves them free to comply with their constitutional duty by any effective means available, including, where it is appropriate, freedom of choice. So interpreted, the paragraph is constitutional.

The second paragraph of the statute contains the constitutional infirmity. It reads:

> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The first sentence of the paragraph presents no greater constitutional problem than the third and fourth paragraphs of the statute, discussed above. It allows school boards to establish a geographically zoned neighborhood school system, but it does not require them to do so. Consequently, this sentence does not prevent the boards from complying with their constitutional duty in circumstances where zoning and

neighborhood school plans may not result in a unitary system. The clause in the first sentence permitting assignment for "any other reason" in the board's "sole discretion" we read as meaning simply that the school boards may assign outside the neighborhood school zone for noninvidious administrative reasons. So read, it presents no difficulty. The second and third sentences are unconstitutional. They plainly prohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially "balance" the school system. *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968), *Brown v. Bd. of Ed. of Topeka*, 349 U.S. 294 (1955) (*Brown* II), and *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown* I), require school boards to consider race for the purpose of disestablishing dual systems.

The Constitution is not color-blind with respect to the affirmative duty to establish and operate a unitary school system. To say that it is would make the constitutional principle of *Brown* I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction that boards must take steps adequate to abolish dual systems. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking

affirmative steps to desegregate its system, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear, see *Northcross v. Bd. of Ed. of the Memphis City Schools*, —U.S.—, 38 L.W. at 4220 (1970) (Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.

Although we hold these statutory prohibitions unconstitutional as violative of equal protection, it does not follow that "bussing" will be an appropriate remedy in any particular school desegregation case. On this issue we express no opinion, for the question is now on appeal to the United States Court of Appeals for the Fourth Circuit and is not for us to decide.

It is clear that each case must be analyzed on its own facts. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article VI, clause 2 of the Constitution).

V. [sic]

As we have no cause to doubt the sincerity of the various defendants, the plaintiffs' motion to hold them in contempt for interference with the district court's orders and their request for an injunction against enforcement of the statute will be denied. We believe the defendants, including the state court plaintiffs, will, pending appeal, respect this court's judgment, which applies statewide with respect to the constitutionality of the statue.

Several of the parties have moved to be dismissed from the case, alleging various grounds in support of their motions. Because of the view we take of this suit and the limited relief we grant, the motions to dismiss become immaterial. The school board is undeniably a proper party before the court on the constitutional issue, since it is a party to the desegregation

suit. We can, therefore, consider and adjudge the validity of the statute, regardless of the position of the other parties. That we consider the substantive arguments of all the parties in no way harms those who have moved to be dismissed.

An appropriate judgment will be entered in accordance with this opinion.

JUDGMENT OF THE COURT BELOW

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA, CHARLOTTE DIVISION

CIVIL NO. 1974

JAMES E. SWANN; et al., *Plaintiffs,*

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM MCNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina, *Defendants,*

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. MCLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R.

CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Civil No. 2631

MRS. ROBERT LEE MOORE, et al.,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools,

Defendants.

FINAL JUDGMENT

Upon reconsideration of our memorandum opinion filed April 28, 1970, we withdraw Part V.

It is now ORDERED, ADJUDGED and DECREED that the following portion of N. C. General Statute 115-176.1 prohibiting assignment by race and bussing be and hereby is held unconstitutional, void, and of no effect:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in con-

travention of this article is prohibited, and public funds shall not be used for any such bussing.

All parties are hereby enjoined from enforcing, or seeking the enforcement of, the foregoing portion of the statute.

Plaintiffs' motion to hold defendants in contempt is denied; the various motions to dismiss are denied.

This 22 day of June, 1970.

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

JOHN D. BUTZNER, JR.
United States Circuit Judge

JAMES B. MCMILLAN
United States Circuit Judge [sic]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

MRS. ROBERT LEE MOORE, ET AL,
Plaintiffs
vs.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools,
Defendants

Civil Action No. 2631

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

On June 22, 1970, a "Final Judgment" was entered by the three-judge district court in this cause.

The plaintiffs hereby give notice of appeal, and do hereby appeal, from such Judgment to the Supreme Court of the United States.

This appeal is taken, and this Notice of Appeal is entered, pursuant to the provisions of 28 U.S.C. 1253.

This 23rd day of June, 1970.

WM. H. BOOE

W. S. BLAKENEY

Attorneys for the Plaintiffs

FULL CAPTION OF THE CASE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

NO.

MRS. ROBERT LEE MOORE, for herself and for her minor children, OSCAR MOORE, LOIS MOORE, GRACE MOORE and JERRY MOORE, J. D. LITTLE, JR. and BETTIE C. LITTLE, for themselves and for their minor child, ALEC LITTLE, JOHN T. VERNON and NANCY H. VERNON, for themselves and for their minor children, PATTY VERNON, DAVID VERNON and ERIC VERNON, FLOYD T. BOYCE and LOUISE D. BOYCE, for themselves and for their minor children, LOU ANN BOYCE, LISA C. BOYCE and FLOYD T. BOST, JR., V. DON PERRIN and NANCY G. PERRIN, for themselves and for their minor children, VIC PERRIN, DONNA PERRIN and SANDRA PERRIN, JACK V. SCOTT and JANE B. SCOTT, for themselves and for their minor children, KENNY SCOTT and CRAIG SCOTT, MRS. MARTHA M. GLENN, for herself and for her minor child, CONNIE GLENN, WILLIAM M. HOOD, JR. and MARY D. HOOD, for themselves and for their minor children, ROBY WRENN HOOD, WILLIAM M. HOOD, III and MARY LIB HOOD, JOHN D. HASTY, for himself and for his minor children, JOHN D. HASTY, JR. and RENEE HASTY, AUBREY E. EASTERLIN, JR., for himself and for his minor step-children, BILLIE SEW-

ELL, VICKIE SEWELL and KIM SEWELL, JAMES E. KING, for himself and for his minor children, LEIGH KING, CYNTHIA KING, SUSAN KING and JAN KING, MELVIN D. CHILDERS, JR., for himself and for his minor child, CYNTHIA CHILDERS, THOMAS S. WEAVER and MARGARET S. WEAVER, for themselves and for their minor children, LIBBY WEAVER and TERRY WEAVER, TED E. MANNING and JACKIE MANNING, for themselves and for their minor child, STEVEN MANNING, HORACE DAVIS, JR. and EVELYN A. DAVIS, for themselves and for their minor children, HORACE DAVIS, III, EVELYN DAVIS and SUSAN DAVIS, ORRIE B. OATS, for herself and for her minor child, LEROY OATS, JR., THOMAS B. HARRIS, for himself and for his minor children, STEVE HARRIS and KELLY HARRIS, LORENE H. DRESSER, for herself and for her minor child, MICHELL DRESSER, JOHN H. HORNER, for himself and for his minor children, LAURA HORNER, JOHN HORNER and BRIAN HORNER, SHIRLEY C. NAIL, for herself and for her minor children, KIM NAIL and DEANA NAIL, G. DONALD ROBERSON, for himself and for his minor child, CHARLES ROBERSON, RAYMOND KENNETH YOUNG and EDNA R. YOUNG, for themselves and for their minor child, KATHY YOUNG, WILLIAM K. SUMMERVILLE, for himself and for his minor children, MICHAEL SUMMERVILLE and CRAIG SUMMERVILLE, JAMES L. KISER, for himself and for his minor child, KIMBERLY KISER, CHARLES N. BRILEY, for himself and for his minor children, ALLISON BRILEY and NATHANIEL BRILEY, WILLIAM R. DOWTIN and MARION

W. DOWTIN, J. FRANK NEWTON and FRANCES M. NEWTON, W. BAINE MARTIN and ELIZABETH B. MARTIN, EDWARD S. FISHER and EMILY S. FISHER, THOMAS E. MCCABE and ANN R. MCCABE, LLOYD ELLIS ZEDAKER, JR. and MARY FRANCES ZEDAKER, BRENDA A. HILL, BAXTER L. DIXON and HORACE N. WILLIAMSON,

Appellants

VS.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Schools,

Appellees

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 444

MRS. ROBERT LEE MOORE, ET AL,

Appellants

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL,

Appellees

On Appeal From A Decision Of A Three-Judge Court In The United States District Court For The Western District Of North Carolina

BRIEF FOR THE APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 444

MRS. ROBERT LEE MOORE, ET AL,

Appellants

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL,

Appellees

On Appeal From A Decision Of A Three-Judge Court In The United States District Court For The Western District Of North Carolina

---

BRIEF FOR THE APPELLANTS

THE OPINION OF THE COURT BELOW

The decision from which this appeal is taken was rendered by a three-judge court in the United States District Court for the Western District of North Carolina. The Opinion delivered by that Court is reported at 312 F. Supp. 503 (1970), and is also reproduced in

the printed Appendix which has been filed with the Court in this case (44[1]).

THE JURISDICTION OF THIS COURT

This suit originated in the North Carolina State Courts. Because the case involved claim of rights arising under the Constitution of the United States, it was removed into the United States District Court for the Western District of North Carolina. There, by reason of the applicability of 28 USC §2281, it was heard by a three-judge court.

A North Carolina statute is involved in the case, and the essential question before the three-judge court was whether this statute, and a State Court injunction of substantially the same terms as the statute, are in harmony, or in conflict, with the United States Constitution. The three-judge court in its "Final Judgment", ruled that central provisions of the statute, which were also the essential terms of the injunction, are contrary to the United States Constitution, and the Court enjoined "all parties" from "enforcing or seeking" their "enforcement" (63).

The Judgment of the three-judge court was entered on June 22, 1970. On June 23, 1970, the plaintiffs filed Notice of Appeal to this Court (66).

Jurisdiction of this appeal is conferred on this Court by the provisions of 28 USC §1253.

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[1]All references having no other designation than page numbers, are references to the Printed Appendix filed with this Court in this case.

QUESTIONS PRESENTED FOR REVIEW

Was not the injunctive order, which was granted to the plaintiffs in this case, in keeping with the pertinent provisions of the United States Constitution, as expounded by this Court in *Brown vs. Board of Education*?

Upon the facts and circumstances shown by the record in this case, were not the plaintiffs entitled to such injunctive order and should it not now be restored to them?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Provisions of the United States Constitution:

"No person shall be . . . deprived of life, liberty or property, without due process of law".

Amendment V to the Constitution of the United States

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Section 1, Amendment XIV to the Constitution of the United States

Statute of the State of North Carolina:

"*Assignment of pupils based on race, creed, color or national origin prohibited.* — No person shall be refused admission into or be excluded from any

public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

"Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

"The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded

conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

"The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit".

General Statutes of North Carolina, §115-176.1, Vol 3A, p. 173

STATEMENT OF THE CASE

The appellants, who include white and Negro citizens, residents, parents, children and taxpayers of the City of Charlotte and County of Mecklenburg, North Carolina, instituted this suit, on February 22, 1970, in the Superior Court of Mecklenburg County, North Carolina (3).

They alleged that the defendant Board of Education under orders from the United States District Court for the Western District of North Carolina, was about to put into operation a program, the purpose and plan and design of which was to exclude from public schools and assign to public schools thousands of Charlotte-Mecklenburg children, including the

minor plaintiffs, solely according to race and color (9-10, 13-15). The plaintiffs further alleged that they fairly represented, as a class, the other Charlotte-Mecklenburg school children who were, in respect to school attendance, in similar situation with the minor plaintiffs (5-6).

The plaintiffs asserted that in thus designating, according to race and color, the public schools which Charlotte-Mecklenburg children must attend, the defendant Board of Education, under the orders of the United States District Court, was violating rights guaranteed to these children, including the minor plaintiffs, by the Constitution of the United States, and that the Supreme Court of the United States had so ruled in the landmark case of *Brown vs. Board of Education*[1] (10-12).

In their Complaint, the plaintiffs further pointed to the North Carolina statute, quoted above[2], which is, they contend, not only in harmony with the *Brown* decision, but is, in its central provisions, essentially a statutory enunciation of the ruling of that case (11-12).

The plaintiffs therefore asked the State Court, upon the basis of the United States Constitution as construed in *Brown* and the North Carolina statute in

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[1]*Brown vs. Board of Education*, 347 US 483, 74 S Ct 686, 98 L Ed 873 and 349 US 294, 75 S Ct 753, 99 L Ed 1083.

[2]General Statutes of North Carolina, Section 115-176.1, Vol 3A, p. 173.

harmony therewith, to grant an injunction against the wrongful and unlawful compulsions which the defendant Board of Education, by orders of the United States District Court, was about to impose upon them (17-18).

The State Court was of the opinion that the plaintiffs showed valid ground for such an injunction and issued an Order as follows:

> "That the defendants are hereby enjoined and restrained from instituting or implementing or putting into operation or effect, or expending any public funds upon, any plan or program under which any children in the City of Charlotte or Mecklenburg County are denied access to any Charlotte-Mecklenburg public school because of their race or color or are compelled to attend any prescribed Charlotte-Mecklenburg public school because of their race or color" (19-20).

The defendants moved the case into the United States District Court for the Western District of North Carolina upon the ground that the plaintiffs were asserting rights involving and drawing into issue provisions of the United States Constitution and that the case, under 28 USC §1441, was one over which the Federal Courts properly had jurisdiction (21).

The defendants further moved, under 28 USC §2281, for the convening of a three-judge court to pass upon the constitutionality of the aforesaid State statute and, consequently, the validity or invalidity

of the aforesaid State Court injunction. A three-judge court, constituted as required by 28 USC §2284, was thereupon convened (39).

Before the three-judge court conducted its hearing, however, a single Judge of the United States District Court for the Western District of North Carolina, "suspended and held in abeyance and of no force and effect" the aforesaid State Court injunction "pending the final determination by a three-judge court or by the Supreme Court of the issues which will be presented to the three-judge court" (32-33).

Prior to the hearing before the three-judge court, the defendants filed Answer to the plaintiffs' Complaint, and factual issues were further resolved through discovery proceedings in the form of Request for Admissions and Answers thereto (40-43).

Hearing before the three-judge court was held on March 24, 1970. On the same day, the Court heard the related case of *Swann, et al vs. Charlotte-Mecklenburg Board of Education, et al.* The *Swann* case is now before this Court—both on direct appeal from the decision of the three-judge court and on grant of Writ of Certiorari as to other aspects of that case which have been heard in the United States Court of Appeals for the Fourth Circuit.

On April 29, 1970, the three-judge court rendered its decision. The Court struck down central provisions of the State statute, which were also the essence of the State Court injunction. The statute provides that "no

student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins". The Court ruled that this provision is unconstitutional, for that, according to the holding of the Court, the Fourteenth Amendment to the United States Constitution itself requires that compulsory assignments of children to public schools may be made according to race and for the very purpose of creating "racial balance". *Swann vs. Charlotte-Mecklenburg Board of Education* and *Moore vs. Charlotte-Mecklenburg Board of Education*, 312 F. Supp. 503, 509-510 (1970).

Thus, the Court, in its "Final Judgment", adjudged the statutory provision forbidding school assignments according to race to be "unconstitutional, void and of no effect", and declared that "all parties are hereby enjoined from enforcing, or seeking" to enforce, this prohibition against compulsory racial assignments.

In short, said the three-judge court, the Constitution commands that children may be compulsorily assigned to public schools according to race or color.

The plaintiffs' contention is that the United States Constitution neither commands nor authorizes such compulsion, based upon race, but that instead, the Constitution, like the North Carolina statute and the State Court injunction, positively forbids such compulsion. The plaintiffs contend that the ruling of the three-judge court is a direct and basic and complete

contradiction of the meaning of the Fourteenth Amendment to the United States Constitution, as established by the decision of this Court in *Brown vs. Board of Education.*

The plaintiffs are appealing to this Court to protect them, and the children of Charlotte-Mecklenburg, from the compulsions based upon race, which the United States District Court has ordered the defendant Board of Education to impose upon them.

SUMMARY OF ARGUMENT

No constitutional principle is more positively and steadily expounded by the decisions of this Court than this — that in this land, Government, whether State or Federal, shall not act upon its citizens according to their race, and that the application of laws shall not be based on race.

Brown vs. Board of Education established this principle in the field of public education, and laid down the mandate that children shall not be excluded from public schools nor assigned to public schools on the basis of race.

The plaintiffs come before this Court, however, asserting that their constitutional rights are being violated in this very respect. They show that the United States District Court below has issued orders and imposed compulsions under which the plaintiffs, and other children in the City of Charlotte and County of Mecklenburg, North Carolina, are being excluded

from public schools, against their will, and assigned to public schools, against their will, solely on the basis of race and color.

The plaintiffs show, further, that by reason of these orders and compulsions, the public school attendance zones or areas in Charlotte-Mecklenburg have been artificially and non-geographically gerrymandered, for the sole purpose of accomplishing racial inclusions and exclusions — and that thousands of Charlotte-Mecklenburg school children, including the minor plaintiffs, are also being assigned to schools distant even from the children's gerrymandered areas — and that such gerrymandering, and such assignments to even more distant schools, are all compulsory arrangements based upon and shaped according to race.

The plaintiffs contend that the orders of the United States District Court are thus requiring that the Charlotte-Mecklenburg public schools be operated on a racial basis rather than on a non-racial basis, as *Brown vs. Board of Education* commands. The plaintiffs raise the plea that each of them has an individual constitutional right to protection against the racial compulsions which are thus being imposed upon them.

Still further, the plaintiffs show that before these orders and compulsions were promulgated, the Charlotte-Mecklenburg school system was, indeed and in truth, being operated on a non-racial basis and in

keeping with the commands of the Constitution and the ruling of *Brown vs. Board of Education*.

The pertinent decisions of this Court are analyzed for the purpose of demonstrating that they do not support the orders and compulsions in question, but instead forbid them. The basic errors in decisions by a three-judge court and the Court of Appeals below are also discussed in detail.

The plaintiffs undertake to show that from every standpoint, they are entitled to protection in the consitutional right which they are invoking — that logic, consistency, the decisions of this Court, and, above all, the Constitution's guarantees of individual liberty, support their plea.

Finally, the plaintiffs urge that since it cannot possibly be claimed that the compulsions here imposed are free from doubt as to their constitutional validity, it would seem appropriate and needful to give thought to some of the practical considerations which bear upon this great controversy.

ARGUMENT

I.

The Constitution of the United States Guarantees to the Plaintiffs Protection Against Governmental Action Based on Race and That Guarantee Is Being Violated

The essence of this controversy may be stated as follows. In the operation of the public schools of this

country, is there to be governmental compulsion based on race — or is there to be freedom without regard to race?

The United States Constitution, of course, controls the answer. Since that great charter has no higher purpose than that of shielding individual liberty from the power of Government, it would seem likely that the answer must be in favor of the latter alternative —freedom without regard to race. In *Brown vs. Board of Education*, this Court ruled that such is indeed the Constitution's answer.

Yet the plaintiffs are now before the Court urgently and earnestly asserting that the first alternative is being imposed upon them — govermental compulsion based on race — despite this Court's ruling in *Brown* — and that the constitutional rights assured to them by the *Brown* decision are being grievously violated.

Even further, the plaintiffs point out, the tragic irony is that this racial compulsion is being fastened upon them in the name of the *Brown* decision itself, and upon the amazing contention that the United States Constitution requires that this compulsion be imposed.

Each of the minor plaintiffs, both black and white is saying:

> "Because of my race, the school authorities are forcibly barring me from the school I wish to attend. Because of my race, the school authorities

forcibly compel me to attend a school I do not wish to attend. The school authorities take note of the color of my skin and shape these compulsions upon me solely according to whether they find me to be black or white.

"They say that the United States District Court tells them that the Constitution of our Nation requires this. I cannot believe that the Constitution requires that freedom shall thus be taken away from me because of the race into which I was born. Rather, it is my understanding, and my earnest faith and belief, that the Constitution forbids such action being taken against me and protects me from it".

It should be noted that only in this case are there plaintiffs thus complaining that their constitutional rights are being violated. In the companion case of *Swann vs. Charlotte-Mecklenburg Board of Education*, the plaintiffs sought and obtained, and are therefore supporting, the orders of which the plaintiffs in the present case complain. The School Board, defendant both there and here, is essentially in a position of seeking this Court's guidance as to what should be its official course of action and, while opposing the District Court's orders in substantial part, does not by any means present the full and basic opposition which the plaintiffs raise in this case. Nor could the Board do so, for the constitutional rights here relied upon are necessarily and in nature individual and

personal and can be asserted only by those to whom the Constitution has assured them.

> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights".
>
> *Shelley vs. Kraemer*, 334 US 1, 22, 68 S Ct 836, 92 L Ed 1161, 1185

This is clearly expressed by this Court in *State of Missouri vs. S. W. Canada.* There the Court said that "the constitutional right" cannot be made to " 'depend upon the number of persons who may be discriminated against . . .' " and that " 'the essence of the constitutional right is that it is a personal one' ". Further, the Court declared that " 'it is the individual who is entitled to the equal protection of the laws, and if he is denied' " such protection, " 'he may properly complain that his constitutional privilege has been invaded' ". The Court emphasized that "petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to" accord him that right "whether or not other Negroes sought the same opportunity". *State of Missouri vs. S. W. Canada*, 305 US 337, 351, 59 S Ct 232, 83 L Ed 208, 214.

A. The Orders Issued By The United States District Court Require That The Charlotte-Mecklenburg Public School System Be Operated On A Racial Basis

In presenting the case for these plaintiffs, it first seems needful to show that the compulsions, to which the plaintiffs say they are being subjected, are indeed as the plaintiffs declare them to be. It would then seem pertinent to show the factual situation in the Charlotte-Mecklenburg school system, where the alleged compulsions are being imposed.

The directives of the United States District Court, against which the plaintiffs raise their plea of constitutional right, have been issued by that Court in a series of decisions and orders. In the first of these, the Court declared that:

> "Since this case was last before this court in 1965, the law (or at least the understanding of the law) has changed" (286a[1]).

The applicable law is, of course, the Fourteenth Amendment to the Constitution and the interpretation of that Amendment as laid down by this Court in *Brown vs. Board of Education.* The Fourteenth Amendment has obviously not changed. This Court has not at any time stated that its interpretation of the Amendment, as declared in *Brown*, has changed.

The command of the Fourteenth Amendment, and of the *Brown* decision, is that public schools in this land shall be operated "on a non-racial basis"[2]. On the

---

[1]Page references followed by the letter "a" are references to the printed Appendix on file with this Court in the *Swann* case.

[2]*Brown vs. Board of Education*, 349 US 294, 301, 75 S Ct 753, 99 L Ed 1083, 1106.

other hand, as will be here shown, it is clear beyond argument that the District Court has ordered that the public schools of Charlotte-Mecklenburg shall be operated on a racial basis[1].

Thus, if the District Court orders were to be upheld, it could only be upon the ground that the law — the law laid down in *Brown* — has indeed changed. Yet this Court surely would not have made so crucial a change in that fundamental ruling without saying it was doing so.

The District Court's central directive is:

> "That pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students" (822a).

In the "racial composition" of the entire Charlotte-Mecklenburg school system, "about 29% are Negro and about 71% are white" (1301a). This, therefore, is the approximate "proportion of black and white students" that the District Court directs for all schools at all grade levels.

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[1] If it be questioned whether the action here complained of is not Federal rather than State, in that the compulsions originate in the orders of the United States District Court, and that therefore the prohibitions of the Fourteenth Amendment do not apply, the first answer is that it is the defendant School Board which is immediately and directly imposing the compulsions on the plaintiffs. And the conclusive answer to such question, in any event, is that in *Bolling vs. Sharpe*, this Court, on the Fifth Amendment, reached the same conclusion and made the same ruling as in *Brown. Bolling vs. Sharpe*, 347 US 497, 74 S Ct 693, 98 L Ed 884.

It is interesting to note that in its first Opinion and Order, the District Court said that it did not consider that it had "the power to make" such an order (310a). In its second Order, the Court reiterated this, saying more emphatically:

> "The court is not interested in a restatement of the previous demand of plaintiffs that all the schools in the system be populated on a 70/30 basis, because as previously stated the court does not have the power to make such an order . . ." (371a).

Yet the Court later proceeds to do what it had twice declared that it had no power to do.

It is not possible to deny or dispute that the District Court has directed the school authorities to assign children to the Charlotte-Mecklenburg schools on a racial basis. Is it not then equally clear that as to plaintiffs who claim constitutional right against such compulsion imposed according to race, the Fourteenth Amendment and *Brown vs. Board of Education* stand as their protector?

The District Court went on to order:

> "That the defendants maintain a continuing control over the race of children in each school, just as was done for many decades before *Brown vs. Board of Education*, and maintain the racial make-up of each school (including any new and any re-opened schools) to prevent any school from becoming racially identifiable" (823a).

It is submitted that this is indeed an amazing command that in the schools of this City and County, a regime of racial compulsion shall be revived and continuously maintained by governmental force, "just as was done" before this Court outlawed it in *Brown vs. Board of Education.*

The justification will be offered that this time it is integration that is being forced, whereas before it was segregation that was being forced. Nevertheless, it is still force — force at the hands of Government — and force imposed on each individual according to his race and solely on that basis. The plaintiffs are raising the shield of the Constitution against governmental imposition of such force upon them — exactly as did the plaintiffs in *Brown.*

The District Court has further ordered that certain detailed plans or programs be put into effect, by way of implementation of its basic directives (825a, 827a). Under these plans, the boundaries of most of the attendance zones or areas in the Charlotte-Mecklenburg school system have been redrawn in a manner constituting obvious, and often grotesque, gerrymandering — the sole purpose being, as hereinafter shown, to accomplish racial inclusions or exclusions. The United States Court of Appeals for the Fourth Circuit characterizes these attendance areas as being now "drastically gerrymandered" to "promote" racial

mixing[1]. Numerous Charlotte-Mecklenburg schools are also "paired" with other schools in the system, for the purpose of compelling children in such schools, to travel outside their own attendance areas, even though such areas may already have been gerrymandered.

Much of this gerrymandering of attendance areas, and "pairing" to force attendance even beyond gerrymandered areas, is shown in map exhibits which were received in evidence at the hearing in this case before the three-judge court. These have been reproduced and are on file with the Court as a supplement to the printed Appendix in this case (Exhibits — Supplement To Appendix).

Through discovery procedure, it stands specifically admitted and established in the record that this redrawing of attendance area boundaries, and also this "pairing" of numerous schools across attendance area boundaries, "is shaped and controlled by racial considerations, that is, by a conscious and purposeful effort to obtain and to require by assignment within

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[1]Mr. Justice Marshall, when arguing before this Court as counsel for the plaintiffs in the *Brown* case, said with respect to such gerrymandering:

> "Then I think whatever district lines they draw, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint." (Hon. Thurgood Marshall in oral argument before this Court on behalf of the plaintiffs in the case of *Brown vs. Board of Education*).

such restructured districts" and "by assignment of children outside their districts" as "nearly as possible a racial ratio of 70% white and 30% black children in each school" (40-43).

The record in the *Swann* case, where the compulsions now being imposed on the plaintiffs were shaped, and the various decisions and orders of the District Court, and the opinions of the Court of Appeals in that case, are replete with intricate discussions of "pairing, grouping, clustering and satellite zoning" and "rezoning with or without satellites" — all of these being artificial arrangements for forcing children into schools in order to accomplish an increased mixing of races (1208a, 1211a, 1212a, 1214a, 1276a, 1277a).

These elaborate programs for "transporting white children into and black children out of"[1] schools, and vice versa, have come upon the scene comparatively recently and are subsumed in the current colloquial phrase "forced bussing". Under these arrangements, the child is, of course, not actually required to ride a bus, but he is required to get to the assigned school, in one way or another, and the bus transportation is offered to him.

The most frequent opposition to this comes naturally from the child, and the parents of the child, who has been attending a school in his neighborhood and near to his home, and whose life, and the life of his

[1] 1211a.

family, is geared to those circumstances, and who now is excluded from the school he has been attending and is directed to travel thirty miles or more each day to and from a distant and unfamiliar school.[1]

The wisdom of this, and the benefit or harm it may bring, are matters on which there is deep and vigorous disagreement. But the central thrust of this brief is that on one matter there can be no valid disagreement, namely, that if such a child comes into Court and pleads constitutional right and shows that this is being forced upon him against his will by governmental authorities and that he is being subjected to it because of his race — then those who seek to impose the force upon him must give way and cease doing so. Such is the power of constitutional right — and such is the constitutional right declared in *Brown*.

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[1]It might be noted that the member of the Court of Appeals, who has espoused most strongly the compulsory travel to distant schools required by the District Court, formerly spoke very unfavorably of it:

> "This is far from suggesting that children are to be uprooted arbitrarily and bussed against their will to distant places merely to place them with children of the other race. No such thing has been proposed or contemplated in Richmond or, so far as we know, anywhere in this circuit."
>
> *Bradley vs. School Board of Richmond*, 345 F. 2d 310, 323, 324 (4th Cir., 1965). Sobeloff, Circuit Judge (concurring in part and dissenting in part).
>
> cf. *Swann vs. Charlotte-Mecklenburg Board of Education* (1279a)—(opinions not yet printed in official reports). Sobeloff, Circuit Judge (concurring in part and dissenting in part)

B. Prior To The Orders Issued By The United States District Court The Charlotte-Mecklenburg Public School System Was Being Operated On A Non-Racial Basis

It is deeply ironic that racial compulsions of the most extreme nature have been decreed in a school system where the facts pertaining to racial matters are as the record in this case shows them to be in Charlotte-Mecklenburg.

With 84,500 pupils attending 106 schools, this is the 43rd largest public school system in the Nation (1263a). Before the District Court imposed the compulsions here in question, there were Negro children in attendance at all these schools, except 8 of them, and these 8 schools which did not have Negro attendance, had a total attendance of only 5,514 children as compared to the 84,542 children in the school system (7, 34).

As has been hereinabove noted, white children constitute approximately 70%, and Negro children approximately 30%[1] of all the pupils in the Charlotte-Mecklenburg school system. Prior to the issuance of the District Court's orders, there were thousands of white children and thousands of Negro children attending Charlotte-Mecklenburg schools which had enrollments of white and Negro children in approximately these very proportions (7-8, 34).

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[1]To be precise, 71% and 29%.

A majority of the one hundred largest school systems throughout the Nation, had a lower ratio of white and Negro children attending the same schools then was the case in the Charlotte-Mecklenburg school system (8, 34).

As long ago as 1965, in the same *Swann* case which is now pending, it was judicially determined, both in the District Court and in the Court of Appeals, that the Charlotte-Mecklenburg public school system was being operated in keeping with the requirements of *Brown;* that the School Board had instituted, and both the District Court and the Court of Appeals approved, "a desegregation plan based on geographic zoning", which zoning the District Court and the Court of Appeals found not to have been gerrymandered on any considerations of race — with, additionally, all children having "an unqualified right of transfer to any other school in the system, subject only to space limitations in the school to which transfer [was] sought" (1263a), *Swann vs. Charlotte-Mecklenburg Board of Education,* 243 F. Supp. 667 (1965) and *Swann vs. Charlotte-Mecklenburg Board of Education,* 369 F. 2d 29 (4th Circuit, 1966).

Indeed, the District Court Judge who promulgated the orders now at issue, renewed such findings, as recently as 1969, and expressly stated that in the Charlotte-Mecklenburg school system, each pupil was at liberty "to request assignment to another school", that "no reason for transfer need be given" and that

"all transfer requests [were] honored", unless the school to which transfer was requested was "full" (289a).

Yet, this freedom is now gone, for the present orders expressly specify that "freedom of transfer" shall "not be allowed" to any child unless the transfer has an effect of increasing racial mixing (823a). Freedom to go in only one direction is, of course, not freedom at all, but the abolishment of freedom.

This Court expressly so ruled in endorsing unrestricted school transfer arrangements, such as Charlotte-Mecklenburg had, and in condemning a one-way school transfer arrangement, such as the District Court has now ordered:

> "Here the right of transfer, which operates solely on the basis of a racial classification, is a one-way ticket leading to but one destination . . .
>
> . . .
>
> "[I]f the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another".
>
> *Goss vs. Board of Education*, 373 US 683, 687, 83 S Ct 1405, 10 L Ed 2d 632, 635

Still further, in issuing the orders now in question, the District Court found that in the Charlotte-Mecklenburg school system, there was "no racial discrimination" in the expenditure of "money" or the "providing" of "facilities", and no "inequality based upon racial motives" with respect to the "quality" of "teachers" or "books" or "school buildings" or "athletics" or "school fees" or "free lunches" or "elective courses" or the "evaluation of students"; and that the School Board had "achieved a degree and volume" of intermixing of white children and Negro children in the Charlotte-Mecklenburg public schools which "exceeded the performance of any school board whose actions have been reviewed in appellate court decisions" (298a-301a; 311a).

Yet the District Court then proceeded to fasten upon the plaintiffs and thousands of other Charlotte-Mecklenburg school children decrees which are probably not themselves "exceeded" anywhere in their severity and in their direct invasion of individual constitutional rights.

The Charlotte-Mecklenburg school system being as described above, according to the District Court's own findings, what was it that impelled the Court to issue its Draconian edicts? Essentially, said the Court, it was the further fact that in 1969, there were still a few Charlotte-Mecklenburg schools that had members of only one race in them and a number of schools in which the racial mixing did not approximate the 71-29 ratio of the entire school population.

The existence, in the Charlotte-Mecklenburg school system, of this degree of non-mixing, said the Court, was an offense against the Constitution, and the Constitution required, the Court further declared, that the mixing be increased. The directives which the Court then issued, for the purpose of bringing about such increase, have been hereinabove outlined.

C. The Decisions Of This Court Do Not Support Such Orders As The District Court Has Issued

The District Court stated that it had to issue the orders it did because of decisions recently rendered by this Court, such as: — *Green vs. School Board of New Kent County*, 391 US 430, 88 S Ct 1689, 20 L Ed 2d 716; and *Alexander vs. Holmes County Board of Education*, 396 US 19, 90 S Ct 291, 24 L Ed 2d 19; and *Carter vs. West Feliciana Parish School Board*, — US —, 90 S Ct 608, 24 L Ed 2d 477. As the Court pointed out, those cases emphasized that "dual" school systems are not permissible and that it is the duty of the school authorities to operate only "unitary" school systems.

We come then to the question: — Is the Charlotte-Mecklenburg school system "dual" or "unitary"? What do these words mean constitutionally? For the Constitution, of course, controls their meaning.

The District Court, with the acquiescence of the Court of Appeals, held that the Charlotte-Mecklenburg school system is "dual", because, as stated above, in it there are some schools that have members of only

one race in them and a number of schools in which the racial mixing does not approximate the percentage proportions that exist in the school population as a whole.

But that is not by any means what this Court has declared to be the test. In *Alexander vs. Holmes County Board of Education*, this Court defined a "unitary school system" as one "within which no person is to be effectively excluded from any school because of race or color". *Alexander vs. Holmes County Board of Education*, 396, US 19, 90 S Ct 29, 24 L Ed 2d 19. Mr. Justice Black, in other proceedings in the *Alexander* case, stressed that the rights of any pupil "who is effectively excluded from a public school on account of his race or color" must be protected. *Alexander vs. Holmes County Board of Education*, supra.

Chief Justice Burger, concurring in *Northcross vs. Board of Education*, emphasized that this Court has "defined a unitary school system", namely, as one " 'within which no person is to be effectively excluded from any school because of race or color' ". *Northcross vs. Board of Education*, — US —, 90 S Ct —, 25 L Ed 2d 246.

This being, as has been emphatically reiterated, the test — the Charlotte-Mecklenburg school system is "unitary". For years, no person has been excluded—no person claims to have been excluded and nobody claims that anybody has been excluded—from any school in Charlotte-Mecklenburg because of race or

color. *Swann vs. Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (1965) and *Swann vs. Charlotte-Mecklenburg Board of Education*, 369 F. 2d 29 (4th Cir., 1966), (1263a), (7-9, 34).

As has been hereinabove noted, it was judicially ascertained five years ago that children were being assigned to the schools in Charlotte-Mecklenburg on the basis of "geographic zoning", which zoning was not gerrymandered on any considerations of race, with all children having an unqualified right of transfer to any other school in the system. *Swann vs. Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (1965) and *Swann vs. Charlotte-Mecklenburg Board of Education*, 369 F. 2d 29 (4th Cir., 1966).

It will also be remembered, and deserves repeating, that the District Court, before issuing the orders now in question, renewed these findings and specifically stated that in the Charlotte-Mecklenburg schools each pupil was at liberty "to request assignment to another school", that "no reason for transfer need be given", and that "all transfers [were] honored", unless the school to which transfer was requested was "full" (289a).

How then could the District Court condemn Charlotte-Mecklenburg as a school system in which pupils were being excluded from schools because of their race or color?

It would appear that in its recent school decisions, such as *Green vs. School Board of New Kent County*,

Alexander vs. Holmes County Board of Education and *Carter vs. West Feliciana Parish School Board*, this Court was expressing impatience with school authorities whom it deemed to be taking advantage of the phrase "all deliberate speed" by dragging their feet in granting children access to schools and assigning children to schools, without consideration of race or color —and that this Court was expressing its stern disapproval of situations in which the Court was unconvinced that such access truly had been accorded and such assignments truly had been made—without any regard to race or color. The record here establishes beyond doubt or dispute that Charlotte-Mecklenburg is not such a situation.

Green vs. School Board of New Kent County is the lead case cited by those who contend that this Court now interprets the Constitution as meaning, and *Brown* as likewise meaning that children may be, and indeed must be, excluded from schools and assigned to schools on a racial basis, if necessary to accomplish racial mixing.

Careful reading of *Green vs. School Board of New Kent County* reveals, however, that such was not its ruling. At the very outset of that case, this Court stated that the "question for decision" there was "whether under all the circumstances" of the case, the New Kent County School Board had achieved "a system of determining admission to the public schools on a nonracial basis", as required by *Brown vs. Board of Education. Green vs. School Board of New Kent County,*

391 US 430, 431-432, 88 S Ct 1689, 20 L Ed 2d 716, 720.

The plaintiffs have no quarrel with that statement of the test upon which a public school system is to be judged. The plaintiffs say, however, that "under all the circumstances" here shown as to the Charlotte-Mecklenburg school system, it is clear that prior to the District Court orders "admission to the public schools" of Charlotte-Mecklenburg had for years been "on a non-racial basis" and that this school system was genuinely and in truth operating on such basis.

It would appear that the vital factual difference, between the public school system of New Kent County and the public school system of Charlotte-Mecklenburg, is that in the former, children were all along "each year automatically reassigned"[1] to the same schools which they respectively attended when segregation was governmentally compelled, with a right to ask transfer, whereas in Charlotte-Mecklenburg, as has been hereinabove emphasized, governmentally compelled segregation was years ago supplanted by geographic zoning, non-gerrymandered, with freedom of transfer in addition.

It is submitted that *Green vs. School Board of New Kent County* is "under all" its "circumstances" no authority as to what should be the ruling for Charlotte-Mecklenburg "under all" its "circumstances".

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[1]*Green vs. School Board of New Kent County*, 391 US 430, 433, 88 S Ct 1689, 20 L Ed 2d 716, 721.

Further, however—and irrespective of how the Charlotte-Mecklenburg school system is being operated—each of the plaintiffs is pleading his individual constitutional right here, and is entitled to individual protection in his right, not to be forced into or out of any school because of his race or color.

For example, let us suppose that a school board, presiding over a sizeable school system where there are substantial numbers of white and black pupils, is still unlawfully confining Negro children to a certain school in the system, because of their race. Let us further suppose that John Jones, a Negro child in the fifth grade at this school, lives near to the school and that it is in all respects the school which he would naturally and normally attend.

A number of the Negro children who have been confined, for no reason except race, to this school, go into Court and obtain a court order that they shall no longer be denied, on account of their race, access to any school in the system. Because the fifth grade is all or largely Negro, and solely as a step toward changing the condition of segregation at this school, the court order directs that the entire fifth grade be moved to another school or schools.

John Jones, if he wishes it, is at that point entitled to a court injunction protecting him in his individual constitutional right not to be moved, solely on racial considerations, anywhere.

"The Constitution confers upon no individual the right to demand action by the State which results

in the denial of equal protection of the laws to other individuals":

> *Shelley vs. Kraemer*, 334 US 1, 22, 68 S Ct 836, 92 L Ed 1161, 1185

D. The Basic Errors In The Decisions Of The Three-Judge Court And The Court Of Appeals

The central fallacy of the decision of the three-judge Court is exposed by the Court's opinion itself. In analyzing the North Carolina statute, the Court quotes the provision that "no person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin", and then unhesitatingly rules that:

> "There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown vs. Board of Education of Topeka*, 347 US 483, 74 S Ct 686, 98 L Ed 873 (1954)".
>
> *Swann vs. Charlotte-Mecklenburg Board of Education and Moore vs. Charlotte-Mecklenburg Board of Education*, 312 F. Supp. 503, 508 (1970)

The Court turns, however, to the provision that "no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins", and declares it to be "unconstitutional" because, says the Court, it is contrary to the Fourteenth Amendment to:

"[P]rohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially 'balance' the school system".

Swann vs. Charlotte-Mecklenburg Board of Education and Moore vs. Charlotte-Mecklenburg Board of Education, 312 F. Supp. 503, 509 (1970)

Here is a basic and inescapable inconsistency. The Court says it is not constitutionally permissible to exclude a child from a public school on the basis of race, and therefore North Carolina may have a statute outlawing any such practice of racial exclusion. Then the Court faces about and says it is constitutionally permissible to assign a child to a public school and compel him to attend that school on the basis of race, and therefore North Carolina may not have a statute outlawing any such practice of racial assignment.

These are contrary rulings on the same thing. Exclusion from school on the basis of race and assignment to school on the basis of race are the two sides of one coin.

By way of illustration: — A child wants to go to school "A" and does not want to go to school "B". The school authorities, however—on the basis of race—have assigned him to "B". They say to him "we cannot, on the basis of race, exclude you from 'A', but we can, on the basis of race, assign you to 'B', and that we have done, and there you must go". Is it not obvious

that on the basis of race, they have excluded him from "A"?

The Court unhesitatingly and positively holds that the child cannot be racially excluded from "A". Yet the Court immediately allows him to be racially excluded from "A" by ruling that he can be racially assigned to "B".

The Court cannot be right in both of these positions. One or the other must yield. The Court says that its position forbidding racial exclusion cannot yield, since "it is merely a restatement of the principle announced in *Brown vs. Board of Education of Topeka*". The Court is exactly correct in this. Therefore the Court's position permitting racial assignment is the position which must yield.

In order to become consistent, the Court's position on racial assignment must be reversed, so that racial assignment is forbidden. Thereupon it becomes consistent with the Court's position on racial exclusion. Thus, like the Court's position on racial exclusion, the Court's position on racial assignment will have become consistent with *Brown* and "merely a restatement of the principle announced in *Brown*[1].

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[1]The Court also struck down the sentence in the statute which prohibits "involuntary bussing in contravention of this article". "Involuntary bussing" is, however, as has been noted above, a colloquialism for the legally exact language of the preceding sentence, that is, "assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins". These two sentences, as the Court recognized, stand or fall together."

Since the provisions in the statute against racial assignment are the only provisions which the Court struck down, and since we have seen that the outlawing of racial assignment, like the outlawing of racial exclusion, "is merely a restatement of the principle announced in *Brown*", it follows that the statute must stand.

It also follows that the Court injunction granted to the plaintiffs stands — for it is merely a restatement of the central provisions of the statute against racial exclusion and racial assignment — and it is, therefore, like the statute, "merely a restatement of the principle announced in *Brown*".

The paradox here discussed, in the decision of the three-judge court below, brightly illuminates the abyss of confusion and inconsistency into which many of the Federal Courts have fallen, as they have struggled with this public school controversy during the last two to three years. In undertaking to move forward with what they have deemed to be the implementing of *Brown* — that is, by commanding that various school systems now proceed to operate on a racial basis —they have fundamentally repudiated *Brown* — and all of this Court's other decisions outlawing governmental action on the basis of race — apparently without discerning that this is in truth the meaning of their rulings.

In its decision, the three-judge court foreshadowed, and the Court of Appeals in the *Swann* case more fully explicated, a further fundamental error.

The three-judge court expressed the view that the Constitution requires that "any reasonable method" may be used to compel a sufficient "racial 'balance' " in the public schools. *Swann vs. Charlotte-Mecklenburg Board of Education* and *Moore vs. Charlotte-Mecklenburg Board of Education*, 312 F. Supp. 503, 510 (1970).

The Court of Appeals said that "school boards must use all reasonable means" to accomplish such end and that it was adopting "the test of reasonableness" (1267a). The Court of Appeals approved the gerrymandering of the Charlotte-Mecklenburg attendance zones or areas, which, as noted above, it refered to as "drastically gerrymandering" in order "to promote" racial mixing in the schools (1265a). It approved, for Charlotte-Mecklenburg junior and senior high schools, the "pairing" and "clustering" of schools for the purpose of compulsorily assigning children to schools distant even from their own zones after gerrymandering, but ruled that such arrangements as ordered by the District Court for the elementary schools were too "exclusive" and therefore disapproved such arrangements as to the elementary schools (1276a, 1277a[1]).

[1]The Court says that "the pairing and clustering of schools", and, as the Court would seem to imply, the consequent bussing back and forth between them, "has been approved", and the Court cites in support of this "*Green vs. School Board of New Kent County*, 391 US 430, 442, n. 6 (1968)". This would seem to be in error. The footnote in *Green*, referred to by the Court, does indeed mention "bussing", but does not mention "the pairing and clustering of schools". However, "bussing", as has been noted, is the popular

It is submitted that such a rule of "reasonableness" would necessarily mean unending litigation in this field — for the Courts would have to rule, with respect to each administrative decision and action, as to whether they, the courts, deem it to be "reasonable" or not.

In a far more fundamental respect, however, this approach is grievously wrong. We deal here with constitutional rights. They may not be granted or withheld by a court as the court may consider reasonable or wise or desirable. They do not rest in equitable discretion.

The Constitution guarantees the plaintiffs, as this Court has declared, freedom from any governmental compulsion imposed on the basis of race — and that does not mean that a court can deprive the plaintiffs of that freedom whenever and to whatever "degree" the court may deem suitable and "reasonable". If this were so, the Bill of Rights and the Fourteenth Amendment would not be in truth a guarantee of anything.

> "The Consitution was intended — its very purpose was — to prevent experimentation with the fundamental rights of the individual".
>
> *Truax vs. Corrigan*, 257 US 312, 338, 42 S Ct 124, 66 L Ed 254, 265

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shorthand term for assigning children to distant schools, and it is of course true that paired or clustered schools are the schools between which such "bussing" does principally take place. The *Green* note is, however, a quotation from a Court of Appeals decision, and that decision instead of approving the "bussing", disapproved it.

E. All Factors Support The Plaintiffs' Contention That Their Constitutional Rights Are Being Invaded

It is argued that since all white children and all Negro children in Charlotte-Mecklenburg were prior to *Brown* required by law to attend separate schools, today's lack of complete mixing is the result of that old law and since that law was unconstitutional, its residual effect upon present day school children is a present violation of their constitutional rights.

Both the District Court and the Court of Appeals refer to other governmental actions, such as "local zoning ordinances" and "urban renewal programs" as tending to cause separate white and Negro residential areas, which in turn tend to cause white children and Negro children to go to school in these separate areas.

It is obvious and natural that children tend to go to school in the vicinities of their homes. There has been no judicial determination, however, that local zoning ordinances, urban renewal programs, and the like, have been operated or applied unlawfully or in any racially invalid manner in Charlotte-Mecklenburg.

As to the old law requiring racial separation in the schools, which was voided in 1954, there can obviously be no argument about the invalidity of its application and operation. But whether separate white and Negro residential areas would have developed in Charlotte-Mecklenburg just as truly in the absence of

that wrongful school law, is indeed a matter of conjecture.

In most of the cities of the states that never had such laws, it is an undeniable fact that separate residential patterns have nevertheless occurred and do exist — just as in Charlotte-Mecklenburg. In seeking to develop in this area ground for their rulings, the District Court and the Court of Appeals are obviously traveling largely in the realm of speculation.

More to the point, however, is this basic consideration. The Fourteenth Amendment does not operate upon wrongful conditions as such, but upon the unequal application of laws. Thus, it does not condemn or forbid racial separateness as such. It condemns and forbids laws or governmental actions which compel racial separateness.

> "Since the decision of this Court in the Civil Rights Cases . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States".
>
> *Shelley vs. Kraemer*, 334 US 1, 13, 68 S Ct 836, 92 L Ed 1161, 1180

So when the Fourteenth Amendment comes upon a situation of racial separateness in public schools, its only inquiry is: — Is there law or governmental action — or governmental subterfuge for that matter —

forcing this racial separateness in these schools? If there is, then the Fourteenth Amendment strikes down the law or the action or the subterfuge. But if there is present neither law nor govermental action nor any governmental pressure, subtly or in any wise being exerted, then the Fourteenth Amendment does not command the elimination of the racial separateness.

Certainly and above all — which is the central point of this brief — the Fourteenth Amendment does not command the elimination of any racial separateness by means of a new governmental compulsion, itself shaped and imposed solely according to race.

If a law drives people into a certain place solely because of their race, the Constitution voids that law and declares those people free to go as they will. But the Constitution does not seize upon them and drive them, solely because of their race, away from where they are, nor to any place. That would be to repeat the same wrong which was originally imposed.

For example, let us picture a situation in which a tribe of Indians, solely because of their race, are forced by State law to live segregated in a certain territory or reservation. Let us assume that after many years, that law is ruled unconstitutional and void, but that the Indians, in truth and in fact, choose to continue living where they are.

Would anyone contend that the Constitution of the United States says to these Indians:

"Solely because of your race and in order to accomplish more racial mixing, you must now leave this place where you wish to continue living. It was unconstitutional that compulsion brought you here, in the first place, solely on account of your race. Therefore, and now, this Constitution places a compulsion upon you to go where you do not wish to go, and again it is solely because of your race that this is required of you".

Would this not be to attribute to the Constitution both self-contradiction and oppression?

Brown vs. Board of Education has no such contradictory meanings. It authorizes no new compulsion upon school children shaped according to race. Instead, it forbids any such.

In *Brown* this Court said it was unconstitutional for a state "to separate" children in the public schools "solely because of their race". *Brown vs. Board of Education*, 347 US 483, 494, 74 S Ct 686, 98 L Ed 873, 880. Therefore the Court forbade the states thus "to separate" the school children. "To separate" is a present active verb. When a state or School Board is no longer in any way separating school children because of race, the mandate of *Brown* is being obeyed.

The United States, in its brief to this Court in the *Brown* case said that under the Constitution, "the decisive inquiry is whether race or color has been entirely eliminated as a criterion in the admission of pupils to public schools". (Brief for the United States,

filed in the United States Supreme Court in the case of *Brown vs. Board of Education,* p. 26).

The decree requested of the Court by the plaintiffs in the *Brown* case was that the school authorities be ordered "to cease using race as a basis for determining admission, assignment or attendance in public schools . . ." (Decree tendered by plaintiffs in United States Supreme Court in the case of *Brown vs. Board of Education*).

Insofar as the plaintiffs have been able to ascertain, nobody claimed anything in *Brown* save that states should be required to cease excluding children from schools and assigning children to schools on the basis of race. Since this is all that was asked or argued, is it not reasonable to say that this is all that *Brown* decided, and that *Brown* is not authority for requirements beyond this?

Synopses of the various briefs for the various plaintiffs in the *Brown* case, as set forth in 99 L Ed 1085-1104, show that the contentions presented were essentially the following:

> "The State of Kansas in affording opportunities for elementary education to its citizens, has no power under the Constitution of the United States to impose racial restrictions and distinctions".
>
> Brief for the plaintiffs in the Kansas case

> "Legally enforced racial segregation in the public schools of South Carolina denies the Negro children

of the State that equality of educational opportunity and benefit required under the equal protection clause of the Fourteenth Amendment".

Brief for the plaintiffs in the South Carolina case

"Normal exercise of the judicial function calls for a declaration that the state is without power to enforce distinction based upon race or color in affording educational opportunities in the public schools. The Fourteenth Amendment prohibits a state from making racial distinction in the exercise of governmental power.

• • •

"The Fourteenth Amendment requires that a decree be entered directing that appellants be admitted forthwith to public schools without distinction as to race or color".

Brief for the plaintiffs in the Virginia case

"This Court . . . should decree that respondents, lacking the constitutional power to assign pupils to public schools on the basis of race, immediately cease and desist using race as a factor in making such assignments".

Brief for the plaintiffs in the District of Columbia case

"Segregation or classification of respondents on the basis of color by the state for determining the

schools they shall attend violates the equal protection clause of the Fourteenth Amendment".

Brief for plaintiffs in the Delaware case

"This court should . . . enjoin the school authorities from considering race in administering school programs . . ."

Brief for amicus curiae

These are the considerations which led to the decision in *Brown*. The plaintiffs agree with them. The orders issued below, however, repudiate them, each and every one.

When the District Court required that children be compulsorily moved here and there, according to race and color, in the Charlotte-Mecklenburg school system, the Court had turned diametrically away from *Brown* and was prescribing a direct violation of *Brown's* ruling and mandate.

Is it not strange indeed that a Court would say to a Negro child, for example! "Because your parents, by reason of their color, were forced to attend this school where you now attend, therefore this Court will now force you, against your will, to go to another school"; and to a white child: "Because, in the past when your parents attended this school where you now attend, Negro children were not allowed to come here, there-

fore this Court will now force you, against your will, to leave this school and go to another school".

Is this not a strange series of non sequiturs? Above all, is it not a strange grant of freedom? As a cure for racial compulsion, says the Court, let us impose more racial compulsion.

Indeed, declares the Court, let the racial compulsion this time be permanent and perpetual. For, as will be recalled, the decree is that in Charlotte-Mecklenburg the school authorities shall "maintain a continuing control over the race of children in each school". Thus, it is decreed that where children are to attend school in this system shall always be determined by the color of their skin and the race into which they were born, and that racial ratios shall be locked upon all succeeding generations of children in these schools, forever (823a).

As some of the Judges of the United States Court of Appeals for the Fifth Circuit have discerningly put it:

> "The freedom of the Negro child to attend any public school without regard to his race or color, first secured in the *Brown* cases, is again lost to him after a short life of less than thirteen years".
>
> *United States vs. Jefferson County Board of Education*, 380 F. 2d 385, 419 (5th Cir., 1967)
> Coleman, Circuit Judge, (concurring)

"[W]hile professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike".

United States vs. Jefferson County Board of Education, 380 F. 2d 385. 405 (5th Cir., 1967)
Gewin and Bell; Circuit Judges, (dissenting)

What then is the true solution?

It is that which is required by the Fourteenth Amendment—and by the *Brown* decision—and, indeed, by all the rulings of this Court against governmental action based on race—and by the Court injunction, which was granted to the plaintiffs, but which has now been wrongfully stricken down—namely:—that no child shall be denied access to any public school because of his race or color and no child shall be assigned to any public school because of his race or color.

All of the zeal and interest and concern that surrounds this matter should be brought to bear to see to it that this freedom is truly and genuinely and in absolute good faith accorded to every child—and that there is no governmental action or practice or subterfuge to the contrary.

Let there be impartial and vigorous enforcement of this freedom from every side and in every quarter. Let governmental compulsion be rooted out of the field—

whether its thrust is in the direction of racial separation or in the direction of racial mixing[1]. Governmental force based upon racial considerations is the evil and the wrong in either case, and it is this that the Constitution forbids.

> "It is unthinkable that our Constitution does not contemplate a middle ground—no compulsion one way or the other."
>
> *United States vs. Jefferson County Board of Education*, 380 F. 2d 385, 414 (5th Cir., 1967)
> Bell and Gewin, Circuit Judges, (dissenting)

> "The true answer remains, give [the child] absolute freedom of choice and see to it that he gets that choice in absolute good faith."
>
> *United States vs. Jefferson County Board of Education*, 380 F. 2d 385, 420 (5th Cir., 1967)
> Coleman, Circuit Judge, (concurring)

This is fair and moral and right. It is logical and consistent and understandable. It is what the Constitution and the applicable decisions of this Court require. Above all, it is individual freedom. It is the key

---

[1]If it be objected that in this, Courts might have to determine motives, intents and purposes, so be it. Courts are, of course, constantly in the business of probing such areas.

to the problem. For this great controversy—to paraphrase the expressive words of Saint Augustine—"will find no rest 'til it rest in"—freedom.

II. Some Practical Considerations Which Are Here Pertinent

The plaintiffs realize that if the law clearly and beyond doubt requires certain court orders, then no considerations of their practicality or advisability can deter a court from issuing them, or an appellate court from sustaining them.

Even their most ardent supporters do not claim, however, that the validity of the orders issued below is beyond doubt. It would seem, therefore, both appropriate and needful that some thought be given to the wisdom and the practicality of the course upon which the lower courts are embarked.

In the first place, in dealing with such orders as have been issued by the District Court below, there can never be an end of confusion and puzzlement—either on the part of those who are subjected to these orders, or the officials who administer them, or the judges who promulgate them. This is true because there underlies such orders an inherent and pervasive inconsistency. And it rises again and again to confront and discomfit whoever seeks to justify such orders, or to understand them or to deal with them. However this deep inconsistency be patched over, it inevitably re-

appears in some equally disconcerting and reprehensible posture.

Thus, it is not long possible to put forward convincingly:

A compulsion as a grant of freedom,

or

A contention that the same words in the Fourteenth Amendment forbid compulsion on the basis of race and also require compulsion on the basis of race,

or

A pronouncement that it is necessary to operate schools on a racial basis in order to implement the command of *Brown* that they be operated on a nonracial basis,

or

A proposition that the cure for racial compulsion in the past is to impose racial compulsion in the present,

or

A decree that since *Brown* outlawed any consideration of race in the assignment of children to schools, therefore school authorities must maintain a continuing control over the race of children in each school, forever.

From every direction, such dilemmas arise, and will endlessly arise, if orders such as have been issued below are maintained.

Further, with respect to consistency, can it ever be satisfactorily explained to the children in a school, and their parents, why their school is selected for purposes of long-distance reassignment of its pupils, and other schools are not?

There are many cities and communities in this Nation where it is not possible to mix the races in public schools, no matter what court orders are issued, for the simple reason that it is not physically and geographically possible to bring the races together in those cities and localities. Is it to be thought that people will ever forget or cease to resent the fact that while mixing for purely racial reasons is forced on them in the name of the Constitution, millions of other people under the same Constitution are not similarly forced, because court orders against them would in any event be unenforceable?

There is another consideration which, it would seem, ought to be taken into account. It has become apparent that these school cases, like Dickens' "Jarndyce vs. Jarndyce," once in a court, seem never to get out of court. This is essentially because the Judges in these cases inevitably get into the business of running the public schools.

The District Court below in its directive for the maintaining of "continuing control over the race of children in each school," has certainly assured itself, and higher Courts as well, a "continuing" task of surveillance and judgment over the Charlotte-Mecklen-

burg school system. Just as truly, the Court of Appeals opened an equally limitless prospect of continuing litigation with its announcement of a test of "reasonableness" to be applied to the constitutional rights here involved.

The consideration most vigorously advanced by those who urge the forced mixing of races in the public schools is that it will assuredly lift the quality of education for everybody. The pros and cons of that broad subject are most certainly beyond the proper scope of this brief. But is it not common sense to question, in passing, whether forcing children, on purely racial grounds into schools—particularly distant schools—which they do not wish to attend, and which their parents do not wish them to attend, is likely to increase their motivation to apply themselves in such schools—or likely to have good effect upon their relations with their fellow students there—or likely in any way to improve the morale, discipline or standards of excellence in those schools?

It ought not to be overlooked that in dealing with schools, even though public, Courts are moving in an area which people regard as a vital and sensitive part of their personal and private and family lives. In this area, a large measure of freedom of individual decision and action is deeply cherished and jealously guarded.

If such freedom is too far invaded by governmental compulsions, people will inevitably find ways to re-

gain it—and this, to be sure, they can still do in this land without resort to means that are disobedient or defiant of law. An obvious example of this is the fact, of common knowledge, that as a direct result of the same sort of compulsion here in question, tens of thousands of children in many states are now moving out of public schools altogether and into private schools.

In this connection, should it not give some pause to note that no legislative body—no elected representatives of the people—anywhere in this Nation have ever enacted any statute, or expressed themselves, in any way as, favoring or authorizing or permitting the compulsion which has been ordered below, namely, the mandatory assignment of children to public schools according to race. On the other hand, various States have enacted statutes to the contrary, and the Congress of the United States has twice expressed itself very specifically and positively to the contrary. Civil Rights Act of 1964, 42 U.S.C. 2000c(b) and 2000c-6(a).

After all, it smacks of alien regimes and ancient oppressions to be driving and herding people here and there according to groups and colors and races. It is hard to accept the idea that the Constitution of the United States commands this—or would indeed tolerate any of it.

It may be thought that the ruling and the directive sought by the plaintiffs is too elementary and too simplistic to be put forth by this Court in a field of contest

as confused and complex as this. But does not the formidable tangle result in large measure from the fact that so many who deal with it have failed to discern where the fundamentals lie?

The plaintiffs had an injunction which directed the defendant School Board not to deny children access to the Charlotte-Mecklenburg public schools on the basis of race or color and not to assign children to the Charlotte-Mecklenburg public schools on the basis of race or color. That injunction, the plaintiffs contend, was in keeping with North Carolina statute, with *Brown vs. Board of Education*, and with the Constitution of the United States. It was taken away from the plaintiffs by the Courts below on the ground that, instead, it conflicted with *Brown* and the Constitution.

That injunction was indeed brief, and simple in its terms. So is the Fourteenth Amendment to the Constitution. So also is the principle laid down in *Brown*. The plaintiffs ask that their injunction, in the strength and simplicity of its elementary terms, be restored to them. Those terms—enforced impartially, literally and without intricate inversions—will give the plaintiffs the protection to which they are constitutionally entitled.

On the other hand, such orders as have been issued in the Courts below if allowed to stand, will be not only instruments of oppression upon the plaintiffs, and all others who are similarly situated across this land. They will also inevitably be the well-springs of

confusion forever compounded and of controversy without end.

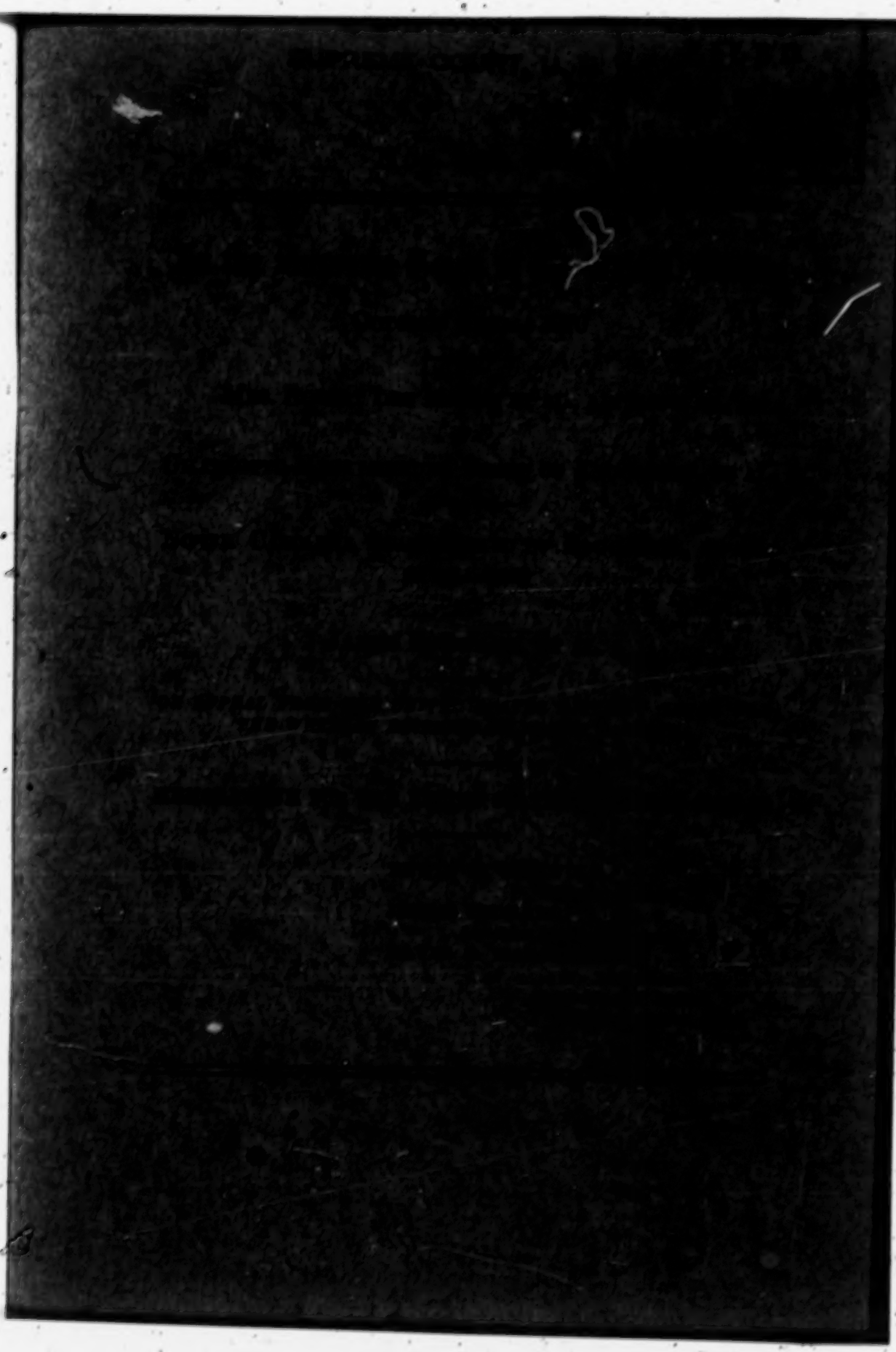
There is only one road out of this great morass. There is only one true answer to the riddles that are now multiplying. That answer is:—Not compulsion based on race—but freedom without regard to race.

CONCLUSION

Upon all of the foregoing, the plaintiffs earnestly pray this Court for a decree that the provisions of State statute and of State Court injunction which are here in issue are constitutional and valid and are entitled to enforcement, and that the orders to the contrary in the Courts below are invalid and constitute erroneous interpretation and application of the United States Constitution.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Appellants



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 444

MRS. ROBERT LEE MOORE, ET AL., APPELLANTS

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.

No. 498

NORTH CAROLINA STATE BOARD OF EDUCATION, ET AL., APPELLANTS

v.

JAMES E. SWANN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

These actions are before the Court on direct appeals from the decision of a three-judge district court[1] holding unconstitutional and enjoining enforcement of a portion of a North Carolina statute on the ground that the statute conflicts with the Fourteenth Amend-

[1] The opinion of the court below in these (consolidated) cases is reported at 312 F. Supp. 503 (W.D.N.C.). The court's judgment, entered subsequently on June 22, 1970, is set forth in the jurisdictional statements at pp. 20a–22a (No. 444) and pp. 14–15 (No. 498).

405-744—70

ment by interfering with the obligation of public school boards to effectuate desegregation of student bodies.[2] Appellees in No. 498; the plaintiffs in the district court, have filed a motion to affirm the judgment of that court or, in the alternative, to dismiss the appeal on the ground that a three-judge court was not required.[3]

INTEREST OF THE UNITED STATES

The North Carolina statute relates directly to the matter of pupil desegregation and would, if implemented, impair the ability of school officials to comply with orders of federal courts, including orders in cases in which the United States is a party, and with plans approved by the Department of Health, Education, and Welfare. In addition, the United States has an interest in the interpretation of, and judicial administration under, 28 U.S.C. 2281.[4]

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[2] The statute, N.C. Gen. Stat. § 115–176.1 (Supp. 1969), is set forth in its entirety in the Appendix, *infra*. The part which was held to be invalid provides as follows:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

[3] Because the two cases involve the same issues, this Court's decision in No. 498 will necessarily also determine the outcome of No. 444.

[4] 28 U.S.C. 2281 provides as follows:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of

In our view, these actions were not required to be adjudicated by a three-judge court and the motion to dismiss should therefore be granted. In the alternative, even if the constitutional issue was substantial, its determination by the court below was correct and should, accordingly, be affirmed.

ARGUMENT

1. As the court below held, the challenged provision of the North Carolina statute runs directly counter to the principle that school officials in districts that had state-compelled dual systems have an affirmative obligation to convert to a unitary system. See *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Green* v. *County School Board*, 391 U.S. 430, 437–438, and cases there cited. In many cases, neither freedom-of-choice nor "racially neutral" zoning is adequate to disestablish the former dual system. Other steps, such as pairing or consolidating schools, redrawing boundary lines, restructuring transportation routes, or any combination of these, may be required.[5]

---

such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[5] See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, Nos. 14,517, 14,518 (C.A. 4, May 26, 1970); *Nesbit* v. *Statesville City Board of Education*, 418 F. 2d 1040 (C.A. 4); *Allen* v. *Board of Public Instruction of Broward County*, No. 30,032 (C.A. 5, Aug. 18, 1970); *Henry* v. *Clarksdale Municipal Separate School District*, 409 F. 2d 682 (C.A. 5), certiorari denied,

And, of course, race must ordinarily be considered in determining the method of pupil assignment when a school system is desegregating pursuant to a court order or to a voluntary plan. To do otherwise would be to attempt a solution without recognizing the problem. Since it is beyond the power of state legislatures to prevent implementation of constitutionally required desegregation plans, *Cooper* v. *Aaron*, 358 U.S. 1, 17–18; *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, 925 (E.D. La.), affirmed, 365 U.S. 569, and since the North Carolina statute does just that by forbidding a means of achieving desegregation which may be required under *Green* and other federal court decisions, the statute is contrary to the Constitution, as the district court held.

2. The three-judge court enjoined the operation of a state-wide statute because it was unconstitutional and in this respect the case appears to fall literally within 28 U.S.C. 2281, so that direct appeal to this Court under 28 U.S.C. 1253 would lie. However, the circumstance that, as applied in this case, the statute directly contravenes, indeed seeks to overrule, an outstanding order of a federal judge puts the case in a different light. The convening of a three-judge court in this situation, with the consequent right to appeal directly to this Court, constitutes, in effect, a means of by-passing the court of appeals, the proper forum

396 U.S. 940; *id.*, No. 29,165 (C.A. 5, Aug. 12, 1970); *United States* v. *School District 151*, 404 F. 2d 1125 (C.A. 7); *id.*, No. 17,754 (C.A. 7, Sept. 8, 1970); *Clark* v. *Board of Education of the Little Rock School District*, 426 F. 2d 1035 (C.A. 8); *United States* v. *Board of Education*, No. 338–69 (C.A. 10, July 28, 1970) (Tulsa).

for contesting the federal judge's order. In addition, a ruling by the three-judge court that such a state statute is valid, while unlikely, would create confusion and uncertainty over the single judge's order. For these reasons the effect of an intervening and conflicting state statute should be addressed to the single district judge and appeal from an adverse decision should be taken to the court of appeals. *Swift & Co.* v. *Wickham*, 382 U.S. 111, is apposite: the rationale of this Court's holding that three-judge courts are not appropriate for adjudication of claims that state statutes are invalid under the Supremacy Clause applies whether the claim is bottomed on a conflict with a federal statute or with an order of a federal judge.

We recognize, of course, that the court below did not find the statute invalid under the Supremacy Clause, although that may have been all that was necessary for decision, but rather enjoined the statute's operation on the ground that it violated the Fourteenth Amendment. Even so, a court of three judges was not required. For *Bailey* v. *Patterson*, 369 U.S. 31, 33 (see, also, *Turner* v. *City of Memphis*, 369 U.S. 350, 353), settles that in cases where prior decisions clearly indicate the state enactment contravenes the Constitution a single judge may decide the matter. And, in our view, the inconsistency between the provisions of the North Carolina statute and the requirements of the Equal Protection Clause is so

apparent that the present actions fall within the rule of *Bailey* v. *Patterson*.[6]

CONCLUSION

For the foregoing reasons, the Court should grant the motion to dismiss or, alternatively, the motion to affirm.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
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DAVID B. MARBLESTONE,
Attorney.

OCTOBER 1970.

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[6] See *Alabama* v. *United States*, No. 5935–70–P (S.D. Ala., June 26, 1970), where it was held that a suit by the state involving the validity of a similar state law presented "no substantial federal question." See, also, *United States* v. *Franklin Parish School Board*, No. 15,632 (W.D. La., August 20, 1970).

APPENDIX

THE NORTH CAROLINA GENERAL ASSEMBLY

1969 SESSION

RATIFIED BILL

CHAPTER 1274

HOUSE BILL 990

AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new section of Chapter 115 of the General Statutes to be codified as GS 115–176.1 and to read as follows:

"§ 115–176.1. *Assignment of pupils based on race, creed, color or national origin prohibited.* No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of edu-

cation of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this Article shall not apply to a temporary assignment due to the unsuitability of a school for its intended conditions or other circumstances which, in the sole discretion of the School Board, require assignment or reassignment.

The provisions of this Article shall not apply to an application for the assignment or re-assignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States or North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

In the General Assembly read three times and ratified, this the 2nd day of July, 1969.

H. P. TAYLOR, JR.

H. P. Taylor, Jr.
President of the Senate.

Philip P. Godwin

Philip P. Godwin
Speaker of the House of Representatives

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 444

MRS. ROBERT LEE MOORE, et al,

Appellants,

v.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, et al,

Appellees.

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IN THE

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MRS. ROBERT LEE MOORE, et al,

Appellants,

v.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, et al,

Appellees.

BRIEF FOR THE APPELLEES

QUESTIONS PRESENTED

Appellants have phrased the question as to whether North Carolina General Statute 115-176.1 and the injunction issued by the North Carolina Superior Court pursuant to that statute is consistent with the Fourteenth Amendment to the United States Constitution as expounded in *Brown v. Board of Education* 347 U.S. 483 (1954); 349 U.S. 294 (1955). Appellees can agree as to the substance of the question presented, but would suggest the following form: Did the three-judge court err in holding that certain provisions of North Carolina General Statute 115-176.1 violated the equal protection clause of the Fourteenth Amendment?

ARGUMENT

I

The Court Improperly Utilized an Overbroad Interpretation of the Statute in Determining Its Unconstitutionality.

The three-judge court held the following language of North Carolina General Statute 115-176.1 unconstitutional and of no effect:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origin. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The court held the above provisions unconstitutional for the following reasons:

> The Constitution is not color blind with respect to the affirmative duty to establish and operate a unitary school system. To say that is would make the constitutional principle of *Brown* I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction that boards must take steps adequate to abolish dual systems. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking affirmative steps to desegregate its system, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear; see *Northcross v. Bd. of Ed. of the Memphis City Schools*, ___ U.S. ___ 38 L.W. at 4220 (1970)

(Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system. (A. 59, 60)

* * *

It is clear that each case must be analyzed on its own facts. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article VI, Clause 2 of the Constitution). (A. 61).

Appellees submit that the Court was overbroad in its interpretation of the statutory provisions under discussion. Courts, when faced with the question of determining the constitutionality of legislation, engage in every reasonable presumption and/or interpretation in order to uphold constitutionality. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144; *United States v. Carolene Products Co.*, 304 U.S. 144; *Becker*

Steel Co. v. Cummings, 296 U.S. 74. Of course, courts should not and are not required to strain interpretations to reach results that are not warranted, but if all or part of a statute can be interpreted to conform to constitutional standards, such an interpretation should be adopted. Furthermore, courts normally analyze legislation as it is applied to the pending case rather than merely examining the legislation without benefit of the pending case. Consequently, legislation may be held constitutional in application to a pending case, but unconstitutional otherwise or only as interpreted.

In this cause, the three-judge court below construed the first sentence as a flat prohibition against assignment by race. Such an interpretation is overbroad since the statute can be construed in a constitutional fashion: this provision should only apply to unitary school systems. A unitary school system should not be required to assign students because of race. In fact, it is unconstitutional to do so. *Brown*, supra. Where the school system in question is not unitary, assignments based on race may be necessary to overcome the duality of the system as required by the Constitution. Consequently, the double edge of this statutory sword can be reasonably and constitutionally interpreted only in the manner suggested. Otherwise, the interpretation given by the three-judge court below would in some instances be contrary to the requirements of the Constitution prohibiting assignments based on race.

II

Assignment to Achieve Racial Balance Is Not A Constitutional Imperative.

The three-judge court was of the opinion that school boards must "always engage in some degree of balancing" to establish a unitary system. However, the prohibition of the statute against assignments to achieve "a balance or ratio

of race" does not prohibit balancing required to eliminate a dual system. It only prohibits what appellees submit is balancing not required by the United States Constitution to achieve a unitary system. The district court in *Swann v. Charlotte-Mecklenburg Board of Education*, Nos. 281 and 349, now before this court on certiorari, in its order of April 23, 1969, stated that it did not "feel that it had the power to make such a specific order calling for a 70/30 assignment ratio in the schools." However, the district court on December 1, 1969, and February 5, 1970, ordered that "efforts should be made to reach a 70/30 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . ". Although variations of the norm were acceptable, appellees were still required to proceed on this basis and were required to submit a plan as close as possible to a 70/30 balance or ratio. The provision of the statute is not a flat prohibition against "some degree of balancing" necessary to achieve a unitary system. Prohibited are those assignments calling for a *certain* balance or percentage racial composition. Consequently, court orders calling for assignments which do not call for a specified balance or ratio of race are not in conflict with this provision. Only orders as that of the district court in *Swann*, Nos. 281 and 349, requiring specified percentages and/or balances of race are prohibited by the statute.[1]

Many decisions have specifically disapproved of the racial percentage approach in each school or in the school system

[1] If there is any doubt that the district court in *Swann*, Nos. 281 and 349, engaged in racial balance, that doubt may be quickly dispelled by the following: Movement of approximately *300 blacks* and a smaller number of white elementary students would produce racial ratios of 20% to 35% black in each of the 72 elementary schools which serve the 44,500 elementary pupils. Those 300 black students would be transported to remote rural schools, namely, Bain, Clear Creek, Matthews, Newell and Huntersville.

as a whole. See *Ellis v. Board of Public Instruction of Orange County*, 423 F. 2d 203 (5th Cir. 1970), *Goss v. Board of Education, City of Knoxville, Tenn.*, 406 F. 2d 1183 (6th Cir. 1969), *Deal v. Cincinnati Board of Education*, 419 F. 2d. 1387 (6th Cir. 1969).

Rejection by the courts is understandable as neither *Brown v. Board of Education*, 374 U.S. 483 (1954) decision nor the subsequent enforcing *Brown* II case made any mention of racial balancing or percentage approach. The Supreme Court has not required racial balance nor has it suggested the racial balance approach to eliminate segregation. Even the more recent pronouncements of the court in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), *Carter v. West Feliciana Parrish School Board*, 396 U.S. 290 (1970), or *Northcross v. Board of Education*, 397 U.S. 232 (1970) fail to make any reference to racial balance.

III

North Carolina's Statement of Public Policy Is Consistent With the Federal Public Policy Enunciated By Congress in the Civil Rights Act of 1964 and the Supreme Court in Prior Pronouncements.

The 1964 Civil Rights Act, 42 U.S.C. §2000c(b) provides:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, religion or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Obviously, North Carolina General Statute 115-176.1 was patterned after this federal act and a ruling by the court of unconstitutionality regarding the state statute would have

the same effect regarding the federal statute. Congress and the federal courts are encumbered by the due process clause in the violation of individuals' rights in the same manner in which the state legislatures and courts are encumbered by the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The vast majority of courts considering the question, either explicitly or implicitly, have either rejected racial balance or not considered it pertinent. If this court were to sustain a racial balance or percentage approach to desegregation, then all previous litigation would be subject to the question of whether these school systems now meet the requirements of the Constitution as so interpreted. Furthermore, a holding of support for such an approach leaves open the question of what percentage or balance is required and, if carried to its logical extreme, would provide every school child a school having the same approximate racial composition as each and every other school in the system. This is not required by the United States Constitution. It was not sought by petitioners or suggested by the Court in *Brown I*[2] and II, *Cooper v. Aaron*, 358 U.S. 1 (1958), *Goss v. Board of Education*, 393 U.S. 683 (1963), *Green*, supra, and related cases,[3] *Alexander v. Holmes County*, supra., or *Northcross v. Board of Education*, supra.

Moreover, this court expressly repudiated a claim for racial balance in jury selection. *Swain v. State of Alabama*, 380 U.S. 205 (1965). There, the court stated (P. 208):

> . . . But the defendant in a criminal case is not constitutionally entitled to demand a proportionate num-

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[2] 21 U.S.L.W. 3164 (1952).

[3] Petitioners' brief in *Green v. New Kent County*, October Term, 1967, No. 695, P. 15, and petitioners' brief in *Raney v. Gould School District*, October Term, 1967, No. 805, p. 29. It is there suggested *Brown II* directed student assignments based on proximity and convenience which is by definition the "neighborhood school," not "racial balance."

> ber of his race on the jury which tries him nor on the venire or jury-roll from which petit jurors are drawn . . .

Similarly, since this court has expressly held that "no person is to be effectively excluded from any school because of race or color," *Alexander v. Holmes*, supra, no student is entitled to demand proportional racial balance in the schools. If it were otherwise, then such terms as "determining admission to the public schools on a non-racial basis", *Brown II*, "conversion to a unitary, non-racial school system", *Green*, supra., and "no longer operate a dual school system based on race or color", *Alexander v. Holmes*, supra, have wholly missed the mark. Racial consideration is the very cornerstone of any plan seeking to achieve racial balance. A requirement of racial balance perverts and destroys the meaning of the equal protection clause. It converts the shield of the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment into swords and thereby result in an unwarranted and unlawful deprivation of the rights and liberties of the children thereby affected. This the North Carolina statute prohibits on sound constitutional principles.

The language of the state statute prohibiting assignments "for the purpose of creating a balance or ratio of race" most clearly is a prohibition against the authority of the local boards of education in North Carolina to use their discretion beyond the requirements of the United States Constitution in desegregating schools. The legislature only intended to state in legislative fashion what it considered the existing state of the law to be. The provision was not intended to thwart the orders of a single district court and such provision does not thwart any *lawful* desegregation order.

IV

The Statute Does Not Prohibit Constitutionally Permitted Assignment and the Furnishing of Transportation to Facilitate Such Assignment

The three-judge district court also construed the provision prohibiting "involuntary bussing" as removing a permissible area of action by school boards when desegregating schools. This provision can also be interpreted in a constitutional fashion. This provision prohibits involuntary bussing where the student assignment is based on race or where the assignment is made "for the purpose of creating a balance of ratio of race." While legislation cannot, as noted above, constitutionally prohibit assignments based on race to dismantle a dual system, it is submitted that the United States Constitution does not require involuntary bussing to achieve this result. Nor does the Constitution require such bussing to achieve "a balance or ratio of race."

It is clear that the Constitution requires school boards to act in a nondiscriminatory manner. Their affirmative duty is limited to disestablishing and desegregating a former dual *system*, not racially balancing each school in the system.

In properly construing this duty, the Fifth Circuit in *Ellis*, supra, approved a plan which called for assignment of students nearest their home, the only limitation in the plan being capacity and assignment to the nearest school if the nearest school was overcrowded.

Again, the Fifth Circuit in *Carr v. Montgomery Board of Education*, (slip opinion, June 29, 1970, No. 29,521) held:

> In the present case, the district court held that the Board plan is "realistic and feasible" and will accomplish what the law requires, that is, the complete disestablishment of the dual school system based upon race in the operation of Montgomery, Alabama, public school system. Having examined the record before us, we agree.

This *Montgomery* plan was also essentially based upon proximity and convenience of students.

The Fourth Circuit has intimated that assignment of students to schools nearest their homes would meet the constitutional requirements for both black and white children. *Eelder v. Harnett County*, 409 F. 2d. 1070 (4th Cir. 1969).

It is submitted that transportation required in connection with a plan for assignment of students to the nearest school, a plan based on proximity and convenience, may occasion additional transportation in a desegregation plan.[4] Such transportation would not be barred by the North Carolina statute. It only seeks to bar assignment and transportation of students involuntarily on account of their race.

It is well to note that the three most recent and controlling Supreme Court decisions, *Green*, supra., *Alexander*, supra., and *Northcross*, supra., really do not resolve the transportation issue. *Green* dealt only with the rural school district where cross bussing perpetuated segregation while *Alexander*, which was based upon *Green*, merely stated that it was the obligation of all school districts to operate unitary systems now. *Northcross* was remanded to the district court with the admonition that "no person is to be effectively excluded because of race or color." Thus, the question of whether transportation as a tool is constitutionally

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[4]Compare brief for the United States on Further Argument of the Questions of Relief filed in *Brown II* and related cases (Nos. 1-5), October Term, 1954. Circuit Judge Sobeloff, then Solicitor General, in discussing the need for additional transportation facilities, argued in a footnote 9 as follows:

> [9]The requirement of additional equipment will be generally restricted, of course, to places where present facilities have not been sufficient to provide adequate transportation for all pupils. It cannot therefore be regarded as, in any real sense, a problem arising from the elimination of segregation. (Page 16).

required in an urban context has not been answered. It may be that transportation in some instances is required to eliminate duality, but it should never be required where transportation is used to create a "balance of ratio or race". If the Constitution does not require a percentage approach as submitted above, certainly the tool for achieving this end is not required.

In summary, the legislation should be upheld for the reason that it does not thwart constitutional mandates, but sets the limits on what local school boards can do beyond the constitutional requirements. Viewed in this light, the legislation is constitutional.

CONCLUSION

Upon the foregoing, appellees pray that the court adopt the interpretations suggested relative to the constitutionality of North Carolina General Statute 115-176.1, i.e., the statute is constitutional but may not be enforced in an unconstitutional manner, and reverse the judgment of the three-judge United States District Court for the Western District of North Carolina, holding certain provisions of that statute unconstitutional.

Respectfully submitted this 3rd day of October, 1970.

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MOORE ET AL. v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

No. 442. Argued October 13, 1970—Decided April 20, 1971

Since both parties in this action challenging a school desegregation plan seek the same result, *viz.*, a holding that North Carolina's Anti-Busing Law is constitutional, there is no Art. III case or controversy. Additionally, on the facts of this case, no direct appeal to this Court lies under 28 U. S. C. § 1253.

312 F. Supp. 503, appeal dismissed for lack of jurisdiction.

Whiteford S. Blakeney argued the cause for appellants. With him on the brief was *William H. Booe.*

William J. Waggoner argued the cause for appellees. With him on the brief was *Benjamin S. Horack.*

Solicitor General Griswold and *Assistant Attorney General Leonard* filed a brief for the United States as *amicus curiae.*

PER CURIAM.

Appellants seek review of the decision of the United States District Court for the Western District of North Carolina declaring a portion of the North Carolina anti-busing statute unconstitutional, and enjoining its enforcement. It is a companion case to No. 498, *North Carolina State Board of Education* v. *Swann, ante,* p. 43. We postponed decision on the question of jurisdiction, 400 U. S. 803 (1970), and after hearing on the merits we now dismiss the appeal for lack of jurisdiction.

At the hearing both parties argued to the three-judge court that the anti-busing law was constitutional and urged that the order of the District Court adopting the Finger plan should be set aside. We are thus confronted

with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution. *Muskrat* v. *United States*, 219 U. S. 346 (1911). Additionally, since neither party sought an injunction to restrain a state officer from enforcing a state statute alleged to be unconstitutional; 28 U. S. C. § 2281, this is not an appeal from "any civil action, suit or proceeding required . . . to be heard . . . by a district court of three judges," 28 U. S. C. § 1253, and hence no direct appeal to this Court is available.

Dismissed.